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JAMES H. McKENNEY,
Clerk.

Wright, Waters & Harber for P. C.

# In the Supreme Court of the United States

OCTOBER TERM, 1901.

Filed Mar. 10, 1902.

KENNEDY MINING AND MILLING COMPANY,
Plaintiff in Error.

vs.

ARGONAUT MINING COMPANY,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

## Brief of Plaintiff in Error.

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*Attorneys for Plaintiff in Error.*

JOHN GARBER,
*Of Counsel.*

....., 1902.

JAMES H. McKENNEY, Clerk.

By ..... Deputy Clerk.

(18,090.)


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IN THE

# Supreme Court of the United States.

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KENNEDY MINING AND MILLING COMPANY,
*Plaintiff in Error,*
vs.
ARGONAUT MINING COMPANY,
*Defendant in Error.*

**In Error to the Supreme Court of the State of California.**

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## I.

## STATEMENT OF THE CASE.

(The map, "Exhibit A," on opposite page, is the same "Exhibit A" found in the Record, between pages 34 and 35.)

On the sixth day of February, 1893, plaintiff in error became the owner of that certain mineral land situated in the County of Amador, in the State of California, known as the Silva Quartz Mine, the boundaries of which are set out as Lot No. 86 on the map "Exhibit A".

Record, between pages 34 and 35.

The title of plaintiff in error to said land is by patent of the United States, issued to plaintiff in error on the sixth day of February, 1893.

Record, pages 31 to 33.

During the period of time between October eighth, 1895, and the twelfth day of December, 1895, plaintiff in error, being the owner and in possession of said land, extracted,

removed and converted from places within the vertical boundaries of the said Silva Quartz Mine, two thousand six hundred and four (2,604) tons of gold bearing ore of the net value of fifty-six thousand ninety-nine dollars and ninety-five cents ($56,099.95).

Record, page 30.

Defendant in error claims to have been the owner of the ore so taken from the said Silva ground, because of its ownership of that other mineral land, the surface boundaries of which are shown on map "Exhibit A" marked "Pioneer (Argonaut) Q. M., Lot No. 48", the end lines of which land (Lot No. 48) are not parallel to each other, and because of the existence within said Lot 48 of a vein of gold bearing quartz having its apex within the area of said Lot 48, which vein, on its dip and on its downward course and between vertical planes drawn downward through said non parallel and divergent end lines extended, passes out of the area of said Lot 48 in the direction of the divergence of said end lines and into the area of said Lot 86, and therein constitutes the vein and ore body mined by plaintiff in error as before stated.

Complaint. Record, page 4.
Statement of Facts. Record, page 30.

The entry of said Pioneer tract, Lot 48, and the payment therefor, were made prior to May 10, 1872, and under the law of the United States of July 26, 1866, and the patent of the United States therefor was issued to the grantor of the defendant in error, on August 12, 1872, reciting that the said patent was issued in pursuance of the Act of Congress of July 26, 1866, entitled "An Act granting the right of way to ditch "and canal owners over the public lands and for other pur-"poses," and the act amendatory thereof, approved July 9, 1870, and the act approved May 10, 1872, entitled "An act "to promote the development of the mining resources of the "United States."

Record, pages 25 to 28.

On August 5, 1897, defendant in error, Argonaut Mining Company, filed its complaint in the Superior Court of the County of Amador, State of California, as plaintiff, against

plaintiff in error as defendant, in which said Argonaut Mining Company alleged ownership of the area of Lot 48 aforesaid, describing its boundaries and the said divergent and non parallel end lines thereof, and alleging ownership also of all that part of a vein apexing within the area of Lot 48 aforesaid, on its downward course between the planes of such end lines of Lot 48 produced and extended each in its own direction.

Such complaint alleged the extraction of ore from said vein by plaintiff in error, of the value of $135,000, and a threat to continue such extraction unless restrained from so doing by injunction.

The prayer of said complaint asked judgment for the value of the ore extracted, also for an injunction restraining plaintiff in error from further extracting ores from such vein within the limits so claimed by defendant in error.

Record, pages 1 to 4.

To this complaint the defendant, Kennedy Mining and Milling Company, plaintiff in error, on February 14, 1898, made answer as follows: Admitted the ownership by plaintiff therein, defendant in error, of the area of the Pioneer (Argonaut) Mine, Lot 48; admitted the surface form thereof and its non parallel and divergent end lines; denied the ownership of the plaintiff therein, defendant in error, of any part of such vein lying without the surface boundaries of the Pioneer (Argonaut) Mine (Lot 48) extended downward vertically; denied that plaintiff therein, defendant in error, ever was the owner of any ore or substance of said vein lying within any land adjoining or without said Lot 48; denied the extraction or taking of any ore, or of any value, by plaintiff in error, from any lands or premises or vein belonging to defendant in error; denied that defendant in error sustained any damage by reason of any act of plaintiff in error complained of in said complaint; and denied that plaintiff in error threatened to mine or work any vein belonging to defendant in error, or to take, convert, or remove any such ore belonging to defendant in error.

Record, pages 5 to 10.

Thereafter, by orders of Court duly made, said cause was transferred from said Superior Court of the County of Ama-

dor to the Superior Court of the County of Calaveras, State of California.

Record, pages 11 to 12.

The cause was tried before the Court last named, upon an agreed statement of facts, the substance of which, material to be presented upon this writ of error, is hereinbefore set out.

Record, pages 12 to 34.

Thereafter, said Superior Court of said County of Calaveras, made and rendered its decision in writing, founded upon said agreed statement of facts, and made and rendered its conclusions of law and its judgment in said cause, to the effect that defendant in error was awarded judgment against plaintiff in error, for the recovery of the agreed value of the ore extracted by it as aforesaid, to wit, the sum of fifty-six thousand ninety-nine dollars and ninety-five cents, together with an injunction restraining plaintiff in error from further mining the aforesaid vein at any point between the extended end lines of said Lot 48.

Record, page 35.

Upon an appeal from said judgment, duly taken by plaintiff in error from said Superior Court to the Supreme Court of the State of California, the said Supreme Court on the 19th day of December, 1900, upon said appeal, rendered its decision and judgment in said cause, by the terms of which the said judgment of said Superior Court was *in all respects* affirmed.

Record, page 83.

Upon such judgment of affirmance, plaintiff in error has duly sued out a writ of error from this Court to the Supreme Court of the State of California in said cause.

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## II.

## QUESTIONS INVOLVED.

The questions involved upon this Writ of Error are several.

First, whether defendant in error, whose Pioneer (Argonaut) claim was located, entered in the land office and paid for

under the act of Congress of July 26, 1866, has "the right to follow" the Pioneer "vein or lode with its dips, angles, and "variations to any depth, although it may enter the land "adjoining" (Sec. 2, Act of 1866) notwithstanding that the end lines of the location are not parallel to each other, and are divergent from each other in the direction of the dip of the vein.

Second, whether the rights of defendant in error to the Pioneer surface and vein so acquired as stated above, were qualified and limited by the provisions of Sec. 5 of the Act of Congress of July 26, 1866, providing, "That, as a further condi- "tion of sale, in the absence of necessary legislation by Con- "gress, the local Legislature of any State or Territory may "provide rules for working mines, involving easements, drain- "age, or other necessary means to their complete develop- "ment; and those conditions shall be fully expressed in the "patent." That is to say, whether Congress thereby expressly reserved the power to limit and define the extralateral right by subsequent legislation.

Third, whether, irrespective of the reservation above stated, the title of defendant in error on May 10, 1872, was "in process of administration" and hence held subject to the right in the Congress to change the law defining the planes within which the extralateral right might be exercised, and limiting the exercise of such right to claims or locations having parallel end lines.

Fourth, whether the act of Congress of May 10, 1872, entitled "an act to promote the development of the mining resources of the United States," is, with all its provisions, those prospective as well as those retrospective, valid as a remedial law, enlarging the rights of prior locators upon the public land, as well as limiting by definite description the extralateral right.

Fifth, whether the defendant in error has waived and thereby lost all right to follow the Pioneer vein into the adjoining land, by failing to reform its boundaries after the enactment of the law of May 10, 1872, and prior to the issuance of its patent, by making the end lines of its location parallel to each other.

Sixth, whether the requirement of Section two of the act of May 10, 1872, that "the end lines of each claim shall be

parallel to each other" is applicable to the Pioneer claim, Lot. 48.

Seventh, whether the defendant in error has "complied with the laws of the United States," which compliance, by the expressed terms of section three of the act of May 10, 1872, is made a condition precedent to the accruing of any extralateral right, by causing the end lines of its location to be so laid upon the ground as to be, not only not parallel to each other, but divergent in the direction of the dip of the vein.

Eighth, whether the provision of section two of the Act of May 10, 1872, that "the end lines of each claim shall be parallel to each other" is to be construed together with the *proviso* of section three that "their right of possession to such "outside parts of such veins or ledges shall be confined to such "portions thereof as lie between vertical planes drawn down-"ward as aforesaid through the end lines of their locations, "so continued in their own direction that such planes will "intersect such exterior parts of said veins or ledges."

Ninth, whether defendant in error, under its patent to the Pioneer mine, Lot 48, issued August 12, 1872, is entitled to exercise the extralateral right as to the Pioneer vein, by following such vein on its downward course into adjoining land, between planes of end lines not parallel to each other but so divergent from each other in the direction of the dip as to result in a gain of 400 feet in length along the course of the vein at the depth where the alleged trespass was committed.

Tenth, whether under such patent defendant in error is entitled to exercise the extralateral right between *any planes other than* those of the end lines of the Pioneer claim as patented.

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## III.

### Manner in Which the Foregoing Questions Are Raised.

The questions involved upon this writ of error are raised in the following manner.

In the stipulation agreeing upon a statement of the facts in this case, it was provided that "Each or either party may

"serve on the opposite party and file in this cause * * * "a statement in writing setting forth specifically its objec- "tions to each fact the admission of which is objected to by "it for want of relevancy and materiality to and competency "to prove the issues presented by the pleadings or for want "of relevancy or materiality to or competency to prove such "issues, and such written statement of objections shall be "deemed and taken as part of the record of the cause and "the objections therein stated shall be ruled on by the Court "the same as though made in open Court or as though "specifically set forth in this stipulation."

In accordance with this right reserved, plaintiff in error at the trial made its objections to certain of said agreed facts, and to the competency and legal effect thereof, such objections being set out seriatim in the bill of exceptions contained in the record herein. Certain of said objections were overruled by the trial Court. To these rulings plaintiff in error properly reserved its exceptions. All of said objections, rulings, and exceptions are specifically set out in said bill of exceptions, and so made of record upon this writ of error.

Record, pages 54 to 73.

Every such action of the Court is made the subject matter of a separate and specific assignment of error, as is made to appear in the record herein, in the several assignments of error.

Record, pages 83 to 104.

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## IV.

**Specifications of the Errors Relied Upon, in Which is Set out Separately and Particularly Each Error Asserted and Intended to be Urged by Plaintiff in Error upon the Hearing in this Court of the Writ of Error Herein.**

In each of the instances in which in the following assignments of error mention is made of an "agreed statement," it is hereby intended to designate the agreed statement of

facts upon which the judgment herein is based, as set forth in the record.

Assignment of error No. 1. At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"First. All and singular each and every the facts, stated in "paragraph IV of said agreed statement, showing among "other matters and things, the corporate capacity of Kennedy "Mining Company"; which said objection was overruled by the court, to which ruling the defendant did duly except and made the same of record as the defendant's exception No. 1.

The ruling of the Superior Court upon said objection (exception No. 1) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decison and judgment herein.

Record, page 84.

Assignment of error No. 2. At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Second. All and singular each and every the facts stated "in paragraph V of said agreed statement, showing among "other matters and things, that on October 13, 1870, said "Kennedy Mining Company applied for a patent to the Ken-"nedy quartz mine, lot No. 44, and that a diagram of said "mine was posted in the U. S. land office at Sacramento, Cal "ifornia, on October 15, 1870"; which said objection was overruled by the court, to which ruling the defendant did duly except and made the same of record as the defendant's exception No. 2.

The ruling of the Superior Court upon said objection (exception No. 2) and the affirmance of such ruling by the Supreme Court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, page 84.

Assignment of error No. 3. At said trial the defendant

specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Fifth. All and singular each and every the facts set forth "in paragraph IX of said agreed statement, showing among "other matters and things, that on March 15, 1871, the U. S. "surveyor general for California instructed William L. Mc-"Kim, a U. S. deputy mineral surveyor, to make patent sur-"vey of said Kennedy quartz mine;" which said objection was overruled by the court, to which ruling the defendant did duly except and made the same of record as the defendant's exception No. 3.

The ruling of the Superior Court upon said objection (exception No. 3) and the affirmance of such ruling by the Supreme Court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, page 85.

Assignment of error No. 4. At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Sixth. All and singular each and every the facts stated "in paragraph X of said agreed statement, showing, among "other matters and things, that said McKim surveyed said "Kennedy quartz mine during April and May, 1871, and "thereupon returned said survey to the U. S. surveyor gen-"eral's office, and that on October 19, 1871, said surveyor "general approved said survey, and that on November 11, "1871, said Kennedy Mining Company entered and paid for "the mining claim so surveyed."

Defendant based its aforesaid objections to the admission as evidence herein of the facts aforesaid, upon the following grounds, to-wit:

"(a) All and singular each and every the facts so objected "to, are immaterial and irrelevant to all and singular each "and every the issues in this cause; and

"(b) All and singular each and every the facts so objected "to, are incompetent as evidence to limit or enlarge or explain "or anywise to control or modify or affect the terms or pro-"visions or legal effect of the patent issued to said Kennedy

"Mining Company for said Kennedy quartz mine, Lot No. 44, "on July 29, 1872, as shown by paragraph XI of said agreed "statement; and

"(c) All and singular each and every the facts so objected "to, relate only to the surface area to be embraced within said "Kennedy quartz mine, Lot No. 44, and in nowise relate to "any extralateral right claimed as attaching to said Ken- "nedy quartz mine, Lot No. 44, nor to any right or interest in "any part of any lode or lodes lying outside the vertical boun- "daries of said Lot No. 44; and

"(d) The agreement as to the common boundary line "between said Kennedy quartz mine and the Pioneer quartz "mine, set out in paragraph VIII of said agreed statement, "is not recited nor referred to in said patent to said Kennedy "quartz mine, nor was said agreement ever recorded in the "office of the county recorder of the County of Amador, "State of California, in which said Kennedy quartz "mine is situate, nor is it alleged in the complaint herein that "this defendant was a party to said agreement, nor that this "defendant ever had any notice or knowledge of the existence "of the same at the time it acquired its title to said Kennedy "quartz mine, Lot No. 44, or at the time when it acquired its "title to the Silva quartz mine, Lot No. 86, the patenting of "which is shown by the facts set forth in paragraph XXVIII "of said agreed statement; and

"(e) Defendant specially sets up and claims that all and "singular each and every the facts set forth in said para- "graphs IV, V, VII, VIII, IX, and X of said agreed statement, "are irrelevant and immaterial to all and singular each and "every the issues in this cause and are incompetent as evi- "dence to prove any of the facts alleged in the complaint "herein, because, as is shown by the facts set forth in para- "graph XXIII of said agreed statement, all of the ores in dis- "pute herein were extracted by defendant from places within "the vertical boundaries of said Silva quartz mine, and with- "out the vertical end boundaries of said Kennedy quartz "mine indefinitely extended, and because, notwithstanding "the existence of the facts set forth in said paragraphs IV, V, "VII, VIII, IX, and X of said agreed statement, this defend- "ant, by reason of its ownership of said Silva quartz mine, "Lot No. 86, which ownership is shown by the facts set forth "in paragraph XXVIII of said agreed statement, was at all of

"the times of the trespasses alleged in the complaint herein, "justly entitled under the statutes of the United States by "authority of which said patent to said Silva quartz mine was "issued, to wit, under chapter six of title thirty-two of the "revised statutes of the United States and legislation sup- "plemental thereto, to the exclusive right and title to take "and hold all of said ores and every part of the substance em- "braced within the area of said Silva quartz mine as described "in said Silva patent; and

"(f) As shown by the facts stated in paragraph XII of said "agreed statement, defendant makes no claim of title or right "to the ores forming the subject of dispute in this cause, by "reason of its ownership of said Kennedy quartz mine, Lot "No. 44."

Said 6th objection excepting in so far as the same relates to paragraphs seven (7) and eight (8) of said agreed statement, was overruled by the court; to which ruling the defendant did duly except and made the same of record as the defendant's exception No. 4.

The ruling of the Superior Court upon said objection (exception No. 4) and the affirmance of such ruling by the Supreme Court of the State of California are designated as an assignment of error, upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, pages 85 to 86.

Assignment of error No. 5. At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the Court as evidence or as possessing probative force herein, of—

"Seventh. All and singular each and every the facts set "forth in paragraph XI of said agreed statement, showing, "among other matters and things, that on July 29, 1872, the "Government of the United States issued to said Kennedy "Mining Company a patent for said Kennedy quartz mine, "Lot No. 44, said patent being set forth *in hacc verba* in said "paragraph XI;"

which said objection was overruled by the Court; to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 5.

The ruling of the Superior Court upon said objection (exception No. 5) and the affirmance of such ruling by the Supreme

Court of the State of California are designated as an assignment of error, upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, pages 86 to 87.

Assignment of error No. 6. At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the Court as evidence or as possessing probative force herein, of—

"Eighth. All and singular each and every the facts set forth "in paragraph XII of said agreed statement, in so far as such "facts show or tend to show that on December 28, 1886, said "Kennedy Mining Company, conveyed to this defendant all "the property and rights conveyed to it, the said Kennedy "Mining Company, by means of said letters patent issued July "29, 1872."

Defendant based its aforesaid objections to such facts set forth in said paragraphs XI and XII of said agreed statement, upon the following grounds, to wit:

"(a) All and singular each and every of such facts are "immaterial and irrelevant to all and singular each and "every the issues in this cause; and

"(b) Defendant makes no claim of right or title to the ores "in dispute in this cause by reason of its ownership of said "Kennedy quartz mine, Lot No. 44; and

"(c) Plaintiff cannot establish a title in itself to the ores "in dispute in this cause by showing that defendant has no "title nor right to said ores by reason of its ownership of the "Kennedy quartz mine, nor by showing the limitations of the "patent to said Kennedy quartz mine; but plaintiff must rely "upon and clearly show its own title to said ores; and

"(d) Defendant claims title to the ores in dispute in this "cause by reason of its ownership of said Silva quartz mine, "Lot No. 86, and not by reason of its ownership of said Ken-"nedy quartz mine, Lot No. 44."

Said eighth objection was overruled by the Court, to which ruling the defendant did duly except, and made the same of record as defendant's exception No. 6.

The ruling of the Superior Court upon said objection (exception No. 6) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assign-

ment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, page 87.

Assignment of error No. 7. At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the Court as evidence or as possessing probative force herein, of—

"Ninth. All and singular each and every the facts set "forth in paragraph XVII of said agreed statement, and the "facts shown by the plat designated as 'Exhibit A' in said "paragraph XVII, in so far as such facts show or tend to "show the boundary lines and surface form of said Kennedy "quartz mine, Lot No. 44;"

which said objection was overruled by the Court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 7.

The ruling of the Superior Court upon said objection (exception No. 7) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, pages 87 to 88.

Assignment of error No. 8. At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the Court as evidence or as possessing probative force herein, of—

"Tenth. All and singular each and every the facts set "forth in paragraph XVIII of said agreed statement, in so far "as such facts show or tend to show the southern end line of "said Kennedy quartz mine and the coincidence of the northern end line of said Pioneer quartz mine with a part of the "southern end line of said Kennedy quartz mine;"

which said objection was overruled by the Court, to which ruling the defendant did duly except, and made the same of record as defendant's exception No. 8.

The ruling of the Superior Court upon said objection (exception No. 8) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assign-

ment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, page 88.

Assignment of error No. 9. At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the Court as evidence or as possessing probative force herein, of—

"Eleventh. All and singular each and every the facts set "forth in paragraph XX of said agreed statement, in so far "as such facts show or tend to show the existence of a ledge of "rock in place bearing gold within said Kennedy quartz mine, "Lot No. 44, and the nature and extent of said vein within "said Kennedy quartz mine;"

which said objection was overruled by the Court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 9.

The ruling of the Superior Court upon said objection (exception No. 9) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, page 88.

Assignment of error No. 10. At the said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the Court as evidence or as possessing probative force herein, of—

"Twelfth. All and singular each and every the facts set "forth in paragraph XXI of said agreed statement, in so far "as such facts show or tend to show the existence and course "of a vein in said Kennedy quartz mine, Lot No. 44, and that "said vein crosses out of said Kennedy quartz mine into said "Pioneer quartz mine;"

which said objection was overruled by the Court, to which ruling the defendant did duly except, and made the same of record as defendant's exception No. 10.

The ruling of the Superior Court upon said objection (exception No. 10) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assign-

ment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, page 89.

Assignment of error No. 11. At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the Court as evidence or as possessing probative force herein, of—

"Thirteenth. All and singular each and every the facts "set forth in paragraphs XXIV and XXV of said agreed "statement, in so far as such facts show or tend to show the "existence of a vein or any vein in said Kennedy quartz mine "or the identity of such vein or any vein in said Kennedy mine "with the vein from which defendant extracted the ores in "dispute south of the line A-B-B', but within the vertical "boundaries of said Silva quartz mine, Lot No. 86;"

which said objection was overruled by the Court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 11.

The ruling of the Superior Court upon said objection (exception No. 11) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, page 89.

Assignment of error No. 12. At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the Court as evidence or as possessing probative force herein, of—

"Fourteenth. All and singular each and every the facts set "forth in paragraph XXVII of said agreed statement, show-"ing that defendant became the owner of said Kennedy "quartz mine on December 28, 1886, and ever since has been "and now is such owner."

Defendant based its aforesaid objections to the admission as evidence herein of the aforesaid facts set forth in said paragraphs XVII, XVIII, XX, XXI, XXIV, XXV, and XXVII of said agreed statement, on the following grounds, to wit:

"(a) All and singular each and every the facts so objected

"to are immaterial and irrelevant to all and singular each "and every the issues in this cause; and

"(b) Defendant makes no claim of right or title to the ores "in dispute in this cause by reason of its ownership of said "Kennedy quartz mine, Lot No. 44; and

"(c) Plaintiff must establish its title and right to the ores "in dispute in this cause, if at all, by showing that in law as "well as in fact, said ores constituted part of the Pioneer "quartz mine, Lot No. 48, set up in the complaint herein, and "not by showing that defendant has no title nor right to said "ores by reason of its ownership of the Kennedy quartz "mine; and

"(d) Defendant claims title to the ores in dispute in this "cause by reason of its ownership of Silva quartz mine, Lot "No. 86, and not by reason of its ownership of Kennedy quartz "mine Lot No. 44;"

which said objection was overruled by the court, to which ruling the defendant did duly except, and made the same of record as defendant's exception No. 12.

The ruling of the Superior Court upon said objection (exception No. 12) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, pages 89 to 90.

Assignment of error No. 13. At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the Court as evidence or as possessing probative force herein, of—

"Fifteenth. All and singular each and every the facts "stated in paragraph VI of said agreed statement, showing "among other matters and things, that on January 13, 1871, "the Pioneer Gold and Silver Mining Company applied for a "patent to the Pioneer quartz mine, Lot No. 48 and that a "diagram of said Pioneer quartz mine was posted in the U. "S. land office at Sacramento, California, and on said Pioneer "mine;"

which said objection was overruled by the Court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 13.

The ruling of the Superior Court upon said objection (exception No. 13) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, page 90.

Assignment of error No. 14. At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the Court as evidence or as possessing probative force herein, of—

"Eighteenth. All and singular each and every the facts "set forth, in paragraph XIII of said agreed statement, show- "ing among other matters and things, that on June 16th, 1871, "the U. S. surveyor general for California instructed said "William L. McKim to make patent survey of said Pioneer "Quartz Mine;"

which said objection was overruled by the court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 16 (14)$^2$.

The ruling of the Superior Court upon said objection (exception No. 16 (14)$^2$, and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, pages 90 to 91.

Assignment of erorr No. 15. At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Nineteenth. All and singular each and every the facts "stated in paragraph XIV of said agreed statement, show- "ing among other matters and things, that said McKim com- "pleted his patent survey of said Pioneer quartz mine on "September 1, 1871, and thereupon returned said survey to the "U. S. surveyor general's office, and that on December 21, "1871, said surveyor general approved said survey, the afore- "said return of such survey of said Pioneer quartz mine being "set forth *in haec verba* in said paragraph XIV of said agreed "statement;"

which said objection was overruled by the Court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 15.

The ruling of the Superior Court upon said objection (exception No. 15) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, page 91.

Assignment of error No. 16. At the said trial the defendant specifically set forth, made and claimed its objections to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Twentieth. All and singular each and every the facts "set forth in paragraph XV of said agreed statement, show- "ing among other matters and things, that on February 23, "1872, said Pioneer Gold and Silver Mining Company entered "and paid for said Pioneer quartz mine as so surveyed by said "William L. McKim, and that the receiver of said U. S. land "office thereupon issued his duplicate receipt evidencing such "entry and payment."

Defendant based its aforesaid objections to the admission as evidence herein of the facts set forth in said paragraphs VI, VII, VIII, XIV, and XV of said agreed statement, upon the following grounds, to wit:

"(a) All and singular each and every the facts so objected "to are immaterial and irrelevant to all and singular each "and every the issues in this cause; and

"(b) All and singular each and every the facts so objected "to are incompetent as evidence to limit or enlarge or explain "or anywise to control or modify or affect the terms or pro- "visions or legal effect of the patent issued to said Pioneer "Gold and Silver Mining Company for said Pioneer quartz "mine, Lot No. 48, on August 12, 1872, as shown by paragraph "XVI of said agreed statement; and

"(c) All and singular each and every the facts so objected "to relate only to the surface area to be embraced within said "Pioneer quartz mine, Lot No. 48, and in nowise relate to "any extralateral right claimed as attaching to said Pioneer "quartz mine, Lot No. 48, nor to any right or interest in any

"part of any lode or lodes lying outside the vertical bounda-
"ries of said Lot No. 48; and

"(d) The agreement as to the common boundary line be-
"tween said Kennedy quartz mine, and said Pioneer quartz
"mine set out in paragraph VIII of said agreed statement,
"is not recited nor referred to in said patent to said Pioneer
"quartz mine, nor was said agreement ever recorded in the
"office of the County recorder of the County of Amador, State
"of California, in which said Pioneer quartz mine is situate,
"nor is it alleged in the complaint herein that this defendant
"was a party to said agreement, nor that this defendant ever
"had any notice or knowledge of the existence of the same at
"the time it acquired its title to said Kennedy quartz mine,
"Lot No. 44; or at the time when it acquired its title to said
"Silva quartz mine, Lot No. 86, the patenting of which is
"shown by the facts set forth in paragraph XXVIII of said
"agreed statement."

Said twentieth objection was overruled by the court, to which ruling the defendant did duly except, and made the same of record as defendant's exception No. 16.

The ruling of the Superior Court upon said objection (exception No. 16) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, pages 91 to 92.

Assignment of error No. 17. At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Twenty-first. All and singular each and every the facts
"set forth in paragraph XVI of said agreed statement, show-
"ing, among other matters and things, that on August 12,
"1872, the U. S. Government issued to said Pioneer Gold and
"Silver Mining Company certain letters patent conveying or
"purporting to convey to said Pioneer Gold and Silver Mining
"Company the Pioneer quartz mine, Lot No. 48, as the same
"is described in said letters patent, a copy of which is set forth
"*in hacc verba* in said paragraph XVI, and defendant specially
"objects to the admission as evidence herein of said letters

" patent and all and singular each and every the facts, matters
" and things therein recited;"
which said objection was overruled by the court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 17.

The ruling of the Superior Court upon said objection (exception No. 17) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, pages 92 to 93.

Assignment of error No. 18. At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

" Twenty-second. All and singular each and every the facts
" set forth in paragraph XXVI of said agreed statement,
" showing that said Pioneer Gold and Silver Mining Company
" conveyed said Pioneer quartz mine to plaintiff on July 3,
" 1893, and that plaintiff ever since has been and now is the
" owner thereof."

Defendant based its aforesaid objections to the admission as evidence herein, of the facts set forth in said paragraphs XVI and XXVI of said agreed statement, as well as its aforesaid objections to the admission as evidence herein of the aforesaid letters patent to said Pioneer quartz mine and the facts, matters and things therein recited, upon the following grounds, to wit:

" (a) All and singular each and every the facts so objected
" to, including all and singular each and every the said patent
" to said Pioneer quartz mine, Lot No. 48, and the facts, mat-
" ters and things therein recited and set forth, are immaterial
" and irrevelant to all and singular each and every the issues
" in this cause, and are incompetent as evidence to prove the
" issues herein or any of them and are incompetent as evidence
" to prove title or right in plaintiff to the ores in dispute in this
" cause, because: Although it is true that the ores in dispute
" herein were all extracted by defendant from the vein men-
" tioned in the complaint herein and in said agreed statement
" and in said Pioneer patent as the ' Pioneer vein ', and that

"the apex of said Pioneer vein extends from the center of the "south end line of said Lot No. 48 through said lot north nine- "teen (19) degrees and fourteen (14) minutes west to the "center of the north end line thereof, and that all of said dis- "puted ores were extracted by defendant from points between "vertical planes drawn down through the end lines of said "Lot No. 48 indefinitely extended in their own directions "respectively,—it is also true that, as shown by the facts set "forth in paragraph XXIII of said agreed statement and by "reference to 'Exhibit A' referred to in said paragraph "XXIII and attached to said agreed statement, all of said "disputed ores were extracted by defendant from points on "the dip of said vein more than 1,300 feet vertically below the "surface of the earth and outside of and distant more than "900 feet easterly from the vertical boundaries of said Lot "No. 48, to wit, more than 900 feet easterly from a vertical "plane drawn down through the easterly side line of said "Lot No. 48, and it is also true that, as shown by said Pioneer "patent and by the complaint herein and by reference to said "'Exhibit A', the end lines of said Pioneer quartz mine, Lot "No. 48, are not parallel to each other but, on the contrary, "the northern end line thereof in its course from its west end "easterly diverges and departs substantially and at a very "large angle toward the north from a line parallel to the "southern end line thereof, such divergence and departure "being to the extent of fourteen (14) degrees and forty-five (45) "minutes, the course of said southern end line from its west "end easterly being north eighty-nine (89) degrees and thirty- "six (36) minutes east and the course of said northern end "line from its west end easterly being north seventy-four (74) "degrees and fifty-one (51) minutes east, and it is also true "that, as shown by the facts set forth in paragraphs XX, "XXII, XXIII, XXIV and XXV of said agreed statement, "said Pioneer vein dips and extends downward into the earth "at such an angle from the plane of the horizon and in such a "manner as to pass from and extend out of said Pioneer "quartz mine easterly through and beyond the vertical east "side line thereof into ground lying easterly from said Lot No. "48 and from said vertical east side line thereof and so onward "continuously in the direction of the aforesaid divergence "between said end lines of said Lot No. 48 to the points above "described where defendant extracted from said vein the ores

" in dispute herein, all of which points are within the vertical " boundaries of defendant's Silva quartz mine, Lot No. 86, and " it is also true that, as shown by said Pioneer patent, the " same was issued on the twelfth day of August, 1872, under " the provisions of that certain act of the Congress of the " United States approved May 10, 1872, entitled 'An act to pro- " 'mote the development of the mining resources of the United " 'States', and more than three months after said act of Con- " gress became a law, and it is also true that, under the provi- " sions of said act of Congress and particularly under the pro- " visions of sections two (2) and three (3) thereof, it was at the " time of the issuance of said Pioneer patent, ever since has " been and now is, necessary that the end lines of said Pioneer " quartz mine, Lot No. 48, should be parallel to each other in " order that any extralateral right or any right to or interest " in any part of said Pioneer vein lying outside the vertical " boundaries of said Lot No. 48 should or could attach to said " Lot No. 48 and be enjoyed by the owners thereof; and there- " fore and because the end lines of said Pioneer quartz mine " are not parallel to each other but diverge and depart from " each other in the direction of the dip of said Pioneer vein " and in the manner aforesaid, it was not competent to the " officers of the Land Department of the United States to make " a grant in connection with the grant of said Pioneer quartz " mine, Lot No. 48, of any extralateral right or any right to, " or interest in any part of said Pioneer vein lying outside the " vertical boundaries of said Lot No. 48, and therefore the act " of the officers of the Land Department of the United States " in granting or attempting to grant an extralateral right in " and by means of said Pioneer patent, was and is against law " and was and is absolutely void; and

" (b) All the ores in dispute in this cause were extracted " by defendant from said Pioneer vein at points within the ver- " tical boundaries of defendant's Silva quartz mine, Lot No. " 86, and distant more than 900 feet from the vertical bounda- " ries of said Pioneer quartz mine, Lot No. 48, and defendant " specially sets up and claims that, because of the fact that, " as shown by said Pioneer patent, the end lines of said Pio- " neer quartz mine, Lot No. 48, are not parallel to each other, " and because of the further fact that said end lines diverge " and depart from each other in the direction of the dip of " said Pioneer vein, such divergence and departure being to

"the extent of fourteen (14) degrees and forty-five (45) min-
"utes, so that in order to reach said points where said ores
"were extracted, it is necessary to follow said Pioneer vein on
"its dip away from said Lot No. 48 and in the direction of
"said divergence to points distant more than nine hundred
"feet from said Lot No. 48—therefore and because of the pro-
"visions of the act of the Congress of the United States,
"approved May 10, 1872, entitled 'An act to promote the
"'development of the mining resources of the United States,'
"under which said Pioneer patent was issued and especially
"because of the provisions of sections two (2) and three (3)
"of said act, the owners of said Pioneer quartz mine, Lot No.
"48, are not now and never have been the owners of or entitled
"to the possession of any part of said Pioneer vein which
"lies outside of the vertical boundaries of said Pioneer quartz
"mine, Lot No. 48, as described in said United States patent
"therefor, and are not now and never have been the owners of
"or entitled to the possession of the ores in dispute in this
"cause or any thereof; and

"(c) All the ores in dispute herein were extracted by de-
"fendant from points without the vertical boundaries of said
"Pioneer quartz mine, Lot No. 48, and by reason of the surface
"form or shape of said Pioneer quartz mine, Lot No. 48, its
"owners never have had and have not now any right under
"any law of the United States or under any law to follow said
"Pioneer vein in its downward course beyond the lines of said
"Pioneer quartz mine, Lot No. 48; and

"(d) The grant or attempted grant of an extralateral
"right in and by said Pioneer patent is indefinite and uncer-
"tain in this, said patent purports to grant only 1,589.94
"linear feet of said Pioneer vein throughout its entire depth,
"and by the conditions of said patent the interest in said
"Pioneer vein thereby granted, or attempted to be granted,
"is specifically restricted to 1,589.94 linear feet thereof, but it
"cannot be ascertained from said Pioneer patent what par-
"ticular segment of 1,589.94 linear feet of said Pioneer vein is
"intended to be granted thereby, nor can it be ascertained
"from said Pioneer patent whether it is intended thereby to
"grant that certain segment of 1,589.94 linear feet of said
"Pioneer vein lying parallel to and next northerly from the
"south end line of said Pioneer quartz mine extended in its
"own course easterly, or whether it is intended by said Pio-

"neer patent to grant that certain segment of 1,589.94 linear "feet of said Pioneer vein lying parallel to and next southerly "from the north end line of said Pioneer quartz mine "extended in its own course easterly, or whether it is intended "by said Pioneer patent to grant a segment of 1,589.94 linear "feet of said Pioneer vein midway between said end lines of "said Pioneer quartz mine indefinitely extended in their own "directions respectively, so that, even though the grant of "1,589.94 linear feet of said Pioneer vein mentioned in said "Pioneer patent were valid, it cannot be ascertained in any "way or manner from said Pioneer patent whether or not the "ores in dispute in this cause ever formed part of that partic- "ular segment of the Pioneer vein intended to be conveyed by "said patent to the Pioneer Gold and Silver Mining Company; "and

"(e) If said Pioneer patent can be construed as defining "and conveying any interest at all in any part of said Pioneer "vein lying outside of said Lot No. 48, such interest so defined "and conveyed must be either (1) that certain segment of "1,589.94 linear feet of said vein lying parallel to and next "northerly from the south end line of said Lot No. 48 extended "in its own course easterly, because, as is shown by said "Pioneer patent, and by the complaint herein, said south end "line of said Lot No. 48 constitutes the base line and initial "boundary thereof, from which all its other boundaries must "be measured, or (2) that certain triangular segment of said "vein having for its north boundary, a line drawn from the "centre of the north end line of said Lot No. 48, to wit, from "the north end of said vein, parallel to the south end line "of said Lot No. 48 extended in its own course north eighty- "nine (89) degrees and thirty-six (36) minutes east, and for "its south boundary, a line drawn from the center of the "south end line of said Lot No. 48, to wit, from the south end "of said vein parallel to the north end line of said Lot No. "48 extended in its own course north seventy-four (74) degrees "and fifty-one (51) minutes east because said triangular seg- "ment of said vein includes the only portion of said vein out- "side of said Lot No. 48, which is definable by reference "to the boundaries of said Lot No. 48, so that in no case can it "be shown that the disputed ores ever constituted part of "any vein segment conveyed by means of said Pioneer "patent."

Said 22nd objection was overruled by the court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 18.

The ruling of the Superior Court upon said objection (exception No. 18) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, pages 93 to 96.

Assignment of error No. 19. At said trial, the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Twenty-third. All and singular each and every the facts "set forth in paragraph XXIII of said agreed statement, "showing among other matters and things, that defendant "has extended its 1,450, 1,550, 1,650 and 1,750 levels south of "a vertical plane drawn down through the north end line of "said Lot No. 48 extended indefinitely in its own direction "north seventy-four (74) degrees and fifty-one (51) minutes "east, and that between October 8, 1895, and December 12, "1895, this defendant extracted 2,604 tons of ore from said "Pioneer vein southerly from said vertical plane but within "the vertical boundaries of said Silva quartz mine, and that "the gross value of said 2,604 tons of ore was $62,218.45, and "that the aggregate cost of mining and milling said 2,604 tons "of ore was $6,119.40, and that the net profit realized by "defendant from said 2,604 tons of ore was $56,099.95;"

which said objection was overruled by the court, to which the defendant did duly except, and made the same of record as the defendant's exception No. (19).

The ruling of the Superior Court upon said objection (exception No. 19) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, pages 96 and 97.

Assignment of error No. 20. At said trial the defendant specifically set forth, made and claimed its objection to the

admission or consideration by the court as evidence or as possessing probative force herein, of—

"Twenty-fourth. All and singular each and every the facts "set forth in paragraph XXIV of said agreed statement, in "so far as such facts show or tend to show that the aforesaid "2,604 tons of ore were extracted from said Pioneer vein south "of said vertical plane drawn down through the line named "in said paragraph XXIV as the line A—B—B¹."

Defendant based its aforesaid objections to the admission as evidence herein of such facts set forth in said paragraphs XXIII and XXIV of said agreed statement, upon the following grounds, to wit:

"(a) All and singular each and every the facts so objected "to are immaterial and irrelevant to all and singular "each and every the issues in this cause and are incompetent "as evidence to prove the issues herein or any of them, "because: Although it is true that all of said ores were "extracted by defendant from the vein mentioned in said Pioneer patent and in the complaint herein and in said agreed "statement as the Pioneer vein, and that the apex of said "Pioneer vein extends from the center of the south end line "of said Lot No. 48 throughout the entire length of said lot "and midway between the side lines thereof to the center of "the north end line thereof, and that all of said ores were "extracted by defendant from points between vertical planes "drawn down through the end lines of said Lot No. 48 indefinitely extended in their own directions respectively,—it is "also true that, as shown by the facts set forth in paragraph "XXIII of said agreed statement and by reference to 'Exhibit "A' referred to in said paragraph XXIII and attached to said "agreed statement, all of said ores were extracted by "defendant from points on the dip of said vein more than "1,300 feet vertically below the surface of the earth, and "outside of and distant more than 900 feet easterly from the "vertical boundaries of said Lot No. 48, to wit, more than "900 feet easterly from a vertical plane drawn down through "the easterly side line of said Lot No. 48, and it is also true "that, as shown by said Pioneer patent and by the complaint "herein and by reference to said 'Exhibit A', the end lines "of said Pioneer quartz mine, Lot No. 48, are not parallel to "each other, but, on the contrary, the northern end line "thereof in its course from its west end easterly diverges and

"departs substantially and at a very large angle, toward the "north from a line parallel to the southern end line thereof, "such divergence and departure being to the extent of four- "teen (14) degrees and forty-five (45) minutes, the course of "said southern end line from its west end easterly being north "eighty-nine (89) degrees and thirty-six (36) minutes east, and "the course of said northern end line from its west end east- "erly being north seventy-four (74) degrees and fifty-one (51) "minutes east, and it is also true that as shown by the facts "set forth in paragraphs XX, XXII, XXIII, XXIV and XXV "of said agreed statement, said Pioneer vein dips and extends "downward into the earth at such an angle from the plane of "the horizon and in such a manner as to pass from and extend "out of said Pioneer quartz mine easterly through and beyond "the vertical east side line thereof into ground lying easterly "from said Lot No. 48 and from said east vertical side line "thereof and so onward continuously in the direction of the "aforesaid divergence between said end lines of said Lot No. "48 to the points above described where defendant extracted "said ores from said vein, all of which points are within the "vertical boundaries of defendant's Silva quartz mine, Lot "No. 86, and it is also true that, as shown by reference to said "paragraph XXIII and to said 'Exhibit A', all of said ores "were extracted outside of and far easterly from said Lot "No. 48 and at points where vertical planes drawn down "through the end lines of said Lot No. 48 extended in their "own directions respectively, are distant from each other more "than 1,900 feet, and it is also true that, as shown by said Pio- "neer patent, the same was issued on the twelfth day of "August, 1872, under the provisions of that certain act of the "Congress of the United States approved May 10, 1872, entitled "'An act to promote the development of the mining resources "'of the United States', and more than three months after "said act of Congress became a law, and it is also true that, "under the provisions of said act of Congress and particularly "under the provisions of sections two (2) and three (3) thereof, "it was at the time of the issuance of said Pioneer patent, "ever since has been and now is, necessary that the end lines "of said Pioneer quartz mine, Lot No. 48, should be parallel "to each other in order that any extralateral right or any "right to or interest in any part of said Pioneer vein lying "outside the vertical boundaries of said Lot No. 48, should or

"could attach to said Pioneer quartz mine, and be enjoyed "by the owners thereof; and therefore and because the end "lines of said Pioneer quartz mine are not parallel to each "other but diverge and depart from each other in the direc- "tion of the dip of the Pioneer vein and in the manner afore- "said, it was not competent to the officers of the Land "Department of the United States to make a grant in connec- "tion with the grant of said Pioneer quartz mine, Lot No. 48, "of any extralateral right or any right to or interest in any "part of said Pioneer vein, lying outside the vertical bounda- "ries of said Lot No. 48, and therefore the act of the officers "of the Land Department of the United States in granting "or attempting to grant an extralateral right in and by "means of said Pioneer patent, was and is against law and "was and is absolutely void; and therefore said ores did not "pass to the Pioneer Gold and Silver Mining Company by "means of said Pioneer patent, and therefore did not pass "to plaintiff herein by means of the deed whereby said Pio- "neer Gold and Silver Mining Company conveyed said "Pioneer quartz mine to said plaintiff; and

"(b) All of said 2,604 tons of ore were extracted by defend- "ant from the vein of which said Pioneer vein forms a part at "points distant more than 900 feet from said Lot No. 48 and "within the vertical boundaries of defendant's Silva quartz "mine, Lot No. 86, which was granted to this defendant on "the sixth day of February, 1893, by letters patent of the "United States issued in pursuance of the provisions of "chapter six of title thirty-two of the Revised Statutes of the "United States, and legislation supplemental thereto, and "*defendant specially sets up and claims that under the aforesaid* "*statutes and legislation* of the United States, this defendant "at all the times mentioned in said complaint has had and "now has against all the world the exclusive title and right "to all and singular each and every the aforesaid 2,604 tons "of ore and to all and singular each and every the substance "contained within the vertical boundaries of said Lot No. 86, "and defendant further under said statutes and legislation of "the United States specially sets up and claims immunity "from any and all claims of said plaintiff to said 2,604 tons "of ore or any thereof and from any and all claims of said "plaintiff to the substance contained within the vertical "boundaries of said Lot No. 86 or any thereof and defendant

"further *specially sets up and claims immunity from and against* "*the claims of plaintiff to said 2,604 tons of ore and to the sub-* "*stance contained within the vertical boundaries of said lot No. 86,* "*because of the fact that, as shown by said Pioneer patent, the end* "*lines of said Pioneer quartz mine, lot No. 48, are not parallel to* "*each other, and because of the further fact that said end lines* "*diverge and depart from each other in the direction of the dip of* "*said Pioneer vein, such divergence and departure being to the extent* "*of fourteen (14) degrees and forty-five (45) minutes,* so that in "order to reach said points where said ores were extracted, "it is necessary to follow said Pioneer vein on its dip away "from said Lot No. 48 and in the direction of said divergence "to points distant more than nine hundred feet from said Lot "No. 48. *Therefore* and because of the provisions of the act of "the Congress of the United States, approved May 10, 1872, "entitled 'An Act to promote the development of the mining "resources of the United States', under which the U. S. patent "to said Lot No. 48 was issued, and especially because of the "provisions of section two (2) and three (3) of said act, the "owners of said Pioneer quartz mine, Lot No. 48, are not now "and never have been the owners of or entitled to the posses-"sion of said 2,604 tons of ore or any thereof, and are not now "and never have been the owners of or entitled to the posses-"sion of the substance contained within the vertical bound-"aries of said Lot No. 86, or any thereof; and

"(c) All the ores in dispute herein were extracted by de-"fendant from points without the vertical boundaries of said "Pioneer quartz mine, Lot No. 48, and by reason of the surface "form or shape of said Pioneer quartz mine, Lot No. 48, its "owners never have had and have not now any right under "any law of the United States or under any law to follow said "Pioneer vein in its downward course beyond the lines of said "Pioneer quartz mine, Lot No. 48; and

"(d) The averment in the complaint herein of an extra-"lateral right is indefinite and uncertain in this, said com-"plaint alleges the ownership of plaintiff in and to 1,589.94 "linear feet of said Pioneer vein with the exclusive right to "said 1,589.94 linear feet of said vein throughout its entire "depth, although it may enter the land adjoining, but it is not "alleged in said complaint that plaintiff has or ever had any "interest in said Pioneer vein excepting said 1,589.94 linear "feet thereof throughout their entire depth as aforesaid, and "it cannot be ascertained from said complaint what particular

"1,589.94 linear feet of said Pioneer vein is intended to be "claimed by plaintiff, nor can it be ascertained from said com- "plaint whether it is the intention of plaintiff to claim that "certain segment of 1,589.94 linear feet of said Pioneer vein "lying parallel with and next northerly from the south end "line of said Lot No. 48 extended in its own course easterly, "or whether it is intended by said complaint to claim that cer- "tain segment of 1,589.94 linear feet of said Pioneer vein lying "parallel to and next southerly from the north end line of said "Lot No. 48 extended in its own course easterly, or whether "it is intended by said complaint to claim a segment of "1,589.94 linear feet of said Pioneer vein midway between said "end lines of said Pioneer quartz mine indefinitely extended "in their own directions respectively, so that it cannot be "ascertained in any way or manner from said complaint "whether or not the ores in dispute in this cause ever formed "part of that particular segment of the Pioneer vein claimed "by plaintiff in its said complaint; and

"(e) If said complaint can be construed as defining any "claim at all of plaintiff to any part of said Pioneer vein lying "outside of said Lot No. 48, such part so defined must be either "(1) that certain segment of 1,589.94 linear feet of said vein "lying parallel to and next northerly from the south end line "of said Lot No. 48 extended in its own course easterly, be- "cause, as is shown by said complaint, said south end line of "said Lot No. 48 constitutes the base line and initial boundary "thereof, from which all its other boundaries must be meas- "ured, or (2) that certain triangular segment of said vein "having for its north boundary, a line drawn from the center "of the north end line of said Lot No. 48, to wit, from the "north end of said vein, parallel to the south end line of said "Lot No. 48 extended in its own course north eighty-nine (89) "degrees and thirty-six (36) minutes east, and for its south "boundary, a line drawn from the center of the south end line "of said Lot No. 48 to wit, from the south end of said vein, "parallel to the north end line of said Lot No. 48 extended in "its own course north seventy-four (74) degrees and fifty-one "(51) minutes east, because said triangular segment of said "vein includes the only portion of said vein outside of said Lot "No. 48 which is definable by reference to the boundaries of "said Lot No. 48 as set out in said complaint so that in no

"case can it be shown that the disputed ores ever constituted "part of any vein segment described in said complaint."
which said objection was overruled by the court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 20.

The ruling of the Superior Court upon said objection (exception No. 22) and the affirmance of such ruling by the Supreme Court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, pages 97 to 101.

Assignment of error No. 21. The defendant also excepted to that part of the decision of the Court expressed in its conclusion of law No. 1, as follows:

"That the plaintiff, Argonaut Mining Company, is and at "all times mentioned in the complaint was the owner of all "that portion of the Pioneer or Argonaut vein lying between "vertical planes drawn downward through the end lines of "said Pioneer or Argonaut mine, lot number 48, and said "end lines produced in their own direction indefinitely east- "wardly, and at all times mentioned in the complaint in this "action said plaintiff had and now has a right to pursue "and follow said vein on its downward course to any depth "underneath the surface of the Silva quartz mine owned by "defendant, within said vertical planes, although in its down- "ward course said vein passes out of and beyond a vertical "plane drawn downward through the east side line of said "Pioneer or Argonaut mine;"
and made such exception of record herein as defendant's exception No. 21.

The ruling of the Superior Court upon said matter (exception No. 21) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, page 101.

Assignment of error No. 22. The defendant also excepted to that part of the decision of the court expressed in its conclusion of law No. 2, as follows:

"That the entry by said defendant upon said vein southerly "beyond the vertical plane drawn through the northerly end "line of said Pioneer or Argonaut mine, and the said end line "produced eastwardly and the extraction of ore therefrom "as set forth in said agreed statement of facts, was wrongful "and unlawful;"

and made such exception of record herein as defendant's exception No. 22.

The ruling of the Superior Court upon said matter (exception No. 22) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, pages 101 and 102.

Assignment of error No. 23. The defendant also excepted to that part of the decision of the Court expressed in its conclusion of law No. 3 as follows:

"That the plaintiff is entitled to judgment and decree of "this Court, as follows:

"(1) That plaintiff have and recover of and from the "defendant, Kennedy Mining and Milling Company, the sum "of fifty-six thousand and ninety-nine 95/100 (56,099.95) dol- "lars in gold, together with interest thereon from September "14th, 1898, at the rate of seven per cent. per annum, also "costs of suit;"

and made such exception of record herein as defendant's exception No. 23.

The ruling of the Superior Court upon said matter (exception No. 23) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, page 102.

Assignment of error No. 24. The defendant also excepted to that part of the decision of the Court expressed in its conclusion of law No. 3 as follows:

"That the plaintiff is entitled to judgment and decree of "this Court as follows:

"(2) That defendant be perpetually restrained and en-

"joined from entering in or upon any portion of said vein "which lies southerly beyond a vertical plane drawn through "the northerly end line of said Pioneer or Argonaut mine and "said end line extended in its own direction eastwardly and "from extracting or removing from any portion of said vein "so lying southerly beyond said vertical plane, any ore, rock "or other material, and from running or causing to be run "or extended thereon any drifts, levels, stopes or mining "works of any kind;"

and made such exception of record herein as defendant's exception No. 24.

The ruling of the Superior Court upon said matter (exception No. 24) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, page 102.

Assignment of error No. 25. Defendant also excepted to that part of the judgment rendered herein, as follows:

"It is now therefore hereby ordered, adjudged and decreed "that plaintiff do have and recover of and from defendant "the sum of fifty-eight thousand two hundred and thirty-seven "and 85/100 ($58, 237.85) dollars, together with costs of suit "taxed at $260;"

and made such exception of record as defendant's exception No. 25.

The ruling of the Superior Court upon said matter (exception No. 25) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, pages 102 and 103.

Assignment of error No. 26. Defendant also excepted to that part of the judgment herein as follows:

"It is further ordered, adjudged and decreed that the "defendant Kennedy Mining and Milling Company, its agents, "servants, attorneys, and employees be, and they are hereby "perpetually restrained from entering in or upon any portion

"of the Pioneer or Argonaut vein lying between vertical "planes drawn downward through the end lines of said Pio- "neer or Argonaut mine, Lot No. 48, and said end lines pro- "duced in their own directions indefinitely eastwardly, and "from extracting or removing from any portion of said vein "so lying between said vertical planes, any ore, rock or other "material, and from running or causing to be run or extended "on said vein any drifts, levels, stopes or mining works of any "kind between said vertical planes, said end lines being "those two certain lines described respectively as follows, "to wit: The north end line, being that certain boundary of "said lot number 48 beginning at the northwest corner of said "lot and running north seventy-four (74) degrees fifty-one (51) "minutes east along the northerly end thereof, and the south "end line being that certain boundary of said lot beginning "at the southwest corner thereof and running north eighty- "nine (89) degrees thirty-six (36) minutes east along the "southerly end thereof;"

and made such exception of record herein as defendant's exception No. 26. (Erroneously cited in Record as exception No. 27.)

The ruling of the Superior Court upon said matter (exception No. 26) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, page 103.

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## V.

## BRIEF OF THE ARGUMENT.

The points of law to be discussed in this case, as disclosed in that part of this brief in which the questions involved are set out, invoke from this court the construction and application of the mining laws of the United States, generally known as the Mining Statute of July 26, 1866, Vol. 14 U. S. Stats. at Large, p. 251; and the later act entitled "An act to promote "the development of the mining resources of the United "States", approved May 10, 1872, Vol. 17 U. S. Stats. at Large, p. 91. U. S. Rev. Stats., Sections 2318 to 2352.

In construing these statutes, it is essential that we keep in view the antecedent "Rules of the Miners" and the legal evolution of the doctrines of the "extralateral right", as the same have grown in the history of mining on the public domain, written and preserved in the decisions of the Courts and in reports of government officials.

It will be seen that until the enactment of the law of May 10, 1872, both the miners' rules and the act of Congress of July 26, 1866, were vague and uncertain in defining the extralateral right. They appear merely as rules of *first impression* and experiment.

The most complete and authentic collection of these local rules existing prior to the enactment of the act of Congress first above referred to, is that contained in the report to the Secretary of the Treasury, made by J. Ross Browne, Special Commissioner of the United States, and published by the Government in 1867.

J. Ross Browne's Report, 1867, pages 235-249.

An examination of these local rules, and of the State and Territorial statutes, shows that the extralateral right was not defined in any of the districts, nor recognized at all in the greater part of the mining territory of the West.

Under the statutes of Idaho, Oregon, Nevada and Arizona, no extralateral right was recognized.

See Browne's Report, pages 242 as to Nevada, 247 as to Oregon, 248 as to Idaho, and 249 as to Arizona.

California had no statute on the subject, and some of the district rules recognized the right while others did not.

The following were the districts recognizing such right in the terms stated, respectively.

Quartz regulation of Nevada County, California:

"Art. 2. Each proprietor of a quartz claim shall hereafter "be entitled to one hundred feet on a quartz ledge or vein, and "the discoverer shall be allowed one hundred feet additional.

"Each claim shall include all the dips, angles and varia-"tions of the vein."

Browne's Report, page 235.

Sacramento County, California:

"Art. 2. Each proprietor of a quartz claim shall hereafter "be entitled to two hundred feet of a quartz ledge or vein and "the discoverer shall be allowed two hundred feet additional. "*Each claim shall include all the dips, angles and variations of "the vein.*"

Browne's Report, page 237.

In Nevada, prior to the enactment of State Law, the Virginia District had this rule:

"Art. 1. All quartz claims hereafter located shall be two "hundred feet on the lead, including all dips and angles."

Browne's Report, page 245.

Reese River District:

"Claims were two hundred feet on the lead, with all dips, "spurs and angles, off-shoots, out-crops, depths, widths, varia- "tions and all the minerals and values therein contained, but "this by another rule was limited to one hundred feet on each "side of the ledge, and excluded parallel ledges in same area."

Browne's Report, page 247.

In California districts that did not recognize any extra-lateral right, we find the following rules.

Sierra County, California:

"Art. 1. A claim on any quartz ledge in this county may "have a length of two hundred feet along the same, and a "width of two hundred and fifty feet at *right angles* with the "ledge, on each side of the same to include all quartz found "within the above mentioned limits."

Browne's Report, page 236.

Tuolumne County, California:

"Art. 2. Each proprietor or locator of a quartz claim shall "be entitled to one hundred and fifty feet in length of the vein, "including all its dips and angles; also one hundred and fifty "feet on each side of said vein, together with the right of way "on either side of said vein to run tunnels and drifts any dis- "tance that may be necessary in order to work said vein; pro- "vided that the right to one hundred and fifty feet herein

"granted on each side of the vein, shall not be deemed to con-
"flict with or detract from the right of any subsequent locator
"who may discover a vein *outside* of said one hundred and fifty
"feet to follow his vein through said ground."

Browne's Report, page 237.

Copperopolis (Calaveras County, California) District:
"Art. 3. A miner shall be entitled to one claim by location
"on a lead of one hundred and fifty feet in length and three
"hundred feet in width" * * *

(No "dip" mentioned.)

Browne's Report, page 242.

The foregoing provisions of statutes and local rules relating to the "extralateral right", as it was recognized or ignored in the mining country of the western States and Territories, are sufficient to indicate the utter confusion upon the question which existed at the time of the enactment of the law of Congress of July 26, 1866.

The condition which Congress found to exist in 1866, is well described by Special Commissioner Browne in his report, in this language:

"There are not less than five hundred mining districts in
"California, two hundred in Nevada, and one hundred each in
"Arizona, Idaho and Oregon, each with its set of written
"regulations. * * * The regulations in the different
"districts are so various, however, that it is impossible to
"reduce them to a few classes comprehending all their pro-
"visions."

Browne's Report, pages 226-7.

He quoted from a report of the Senate Committee of the Nevada Legislature of February 23, 1866, as follows:

"As to uniformity, there is nothing approaching it. There
"never was confusion worse confounded. More than two
"hundred petty districts within the limits of a single state,
"each with its self-approved code, these codes differing not
"alone each from the other, but presenting numberless
"instances of contradictions in themselves."

Browne's Report, page 227.

The miners' rules under consideration by Justice Field in the Eureka case (4th Sawyer, 302) were those only of the Eureka District, which provided expressly that "each locator "should be entitled to all the dips, spurs and angles connect- "ing with his ledge", and the language of that learned Judge in that case related to such district rule and not to the rule in the districts of the West generally, as is erroneously asserted in Lindley on Mines, Sec. 43.

As has been shown herein, the rules of the districts and States and Territories of the West, were generally adverse to the existence of the extralateral right, and whenever such right was allowed, it formed an exception.

From this we deduce the proposition, that the act of Congress of July 26, 1866, in so far as it concerns the extralateral right *as therein expressed*, is not the assertion of a pre-existing right, well defined and understood, but on the contrary it was a first attempt to systematize a mass of vague, uncertain and experimental rules. By the terms of the 5th Section of the act, the matter remained subject to the power of Congress to enact any legislation necessary to provide means for the complete development of the mineral on the public domain, and the right of revision by the Congress was always expressed in the patents issued under the statute.

Of the miners' rules only one was of universal application, and that was the rule that the locator or owner of the claim could have no greater length *beneath the surface* than the length acquired by him upon the surface.

This has been the rule *everywhere and at all times*, as is clearly stated in the Eureka case, p. 322, as follows:

"It is true that *end lines* are not in terms named in the "rules of the miners, but they are necessarily implied, and "no reasonable construction can be given to them without "such implication. What the miners meant by allowing "a certain number of feet on a ledge was that each locator "might follow his vein for that distance on the course of the "ledge, *and to any depth within that* distance. So much of the "ledge he was permitted to hold as lay within vertical planes "drawn down *through the end lines* of his location, and could "be measured anywhere by the feet on the surface. If this "were not so, he might by the bend of his vein hold under "the surface along the course of the ledge double and treble "the amount he could take on the surface. Indeed, instead

"of being limited by the number of feet prescribed by the "rules, he might in some cases oust all his neighbors and take "the whole ledge. No construction is permissible which "would substantially defeat the limitation of quantity on a "ledge, which was the most important provision in the whole "system of rules.

"Similar rules have been adopted in numerous mining "districts and the construction thus given has been uniformly "and everywhere followed. We are confident that no other "construction has ever been adopted in any mining district "in California or Nevada. And the construction is one which "the law would require in the absence of any construction by "miners. If, for instance, the State were to-day to deed a "block in the City of San Francisco to twenty persons, each "to take twenty feet front, in a certain specified succession, "each would have assigned to him by the law a section "*parallel with that of his neighbor of twenty feet in width, cut* "*through the block. No other mode of division would carry out* "*the grant.*"

It follows as a physical fact that under the rules of the miners the planes between which a vein may be followed on its dip by the owner, must be *parallel planes* and that none other can or will preserve the *limitation of length upon the vein.*

As to the *direction* of these *parallel planes*, none of the miners' rules spoke. Neither did the rules of the miners in all instances expressly require that a location should include surface ground, though many of them did so require.

The Supreme Court of California had held that:

"The main thing was *the vein*: this it was that was intended "to be taken up, and the exact direction could not, of course, "be ascertained or accurately described until the vein was "followed up or explored."

Johnson v. Parks, 10 Cal., 449.

The same principle was announced by the Supreme Court of Nevada in an action of ejectment describing a sub-surface vein as the premises sought to be recovered.

Bullion M. Co. v. Croesus M. Co., 2 Nev., 168.

Prior to 1866 and while the "Miners' Rules" stood alone and unsanctioned by act of Congress, there was no reported

case in which the doctrine of following the vein upon its dip was involved, and up to the time when the act of July 26, 1866, was brought before the Committees of Congress, the report of Commissioner Browne had not been made, and hence the Congress had but little light on the subject before passing the act.

The condition of the mining law in the United States at this time is well described in the preface to Gregory Yale's work on "Mining Claims and Water Rights", dated October 14, 1867, in which this language appears:

"In our jurisprudence, until recently, there is a sad defi-
"ciency of attempts to elucidate the principles governing the
"law of mining property. In the old States, where mining
"property was held under the same tenure as other real
"estate, and where the Federal Government owned no land,
"and the subject of mineral lands attracted but little atten-
"tion, as distinct from other lands, the decisions of the Courts
"are neither frequent nor peculiar.

"In the Federal Courts there has been no important deci-
"sion in a mining case, except the one of California origin,
"involving the construction of the mining ordinances of
"Mexico, and no other case on those ordinances is likely to
"be presented. With this exception, and one or two cases
"arising under the leasing system, with one case from
"Nevada, the Federal tribunals furnish nothing for our
"guide."

In the introductory remarks prefacing Halleck's translation of De Fooz, the same view is taken (in 1860), namely:

"The law of mines, as a special branch of jurisprudence,
"has received heretofore very little attention in the United
"States, either from legislators or from members of the legal
"profession. While every other civilized country, with a few
"unimportant exceptions, has had its mining code or mining
"laws, defining and regulating the rights of the State and of
"individuals in this species of property, our own legislators
"have virtually ignored the whole subject, leaving the Courts
"to apply to the few cases which have arisen, the English
"laws and decisions of English Courts. And even these laws
"and decisions have not always been correctly understood or
"properly applied."

Without burdening this brief with extensive citations of authorities in detail as to the legislative history of the law of

the 26th of July, 1866, reference for that subject matter is made to the above named work of Gregory Yale, pages 325 to 348.

Out of this anomalous condition, out of a *system of trespasses upon the public domain*, was wrought by the Congress of the United States, at a time when it was overburdened with vital questions of reconstruction at the end of the great civil war, and by means of injecting a new subject into an act introduced for a different purpose and having a foreign title, the first Federal mining law of this country, and with respect to the principle here involved, unlike any mining system ever in force elsewhere in the civilized world.

The history of the bill shows that its friends saw the danger that threatened the mining industry of the Pacific Coast, in the claims that were being asserted boldly upon the floors of Congress that the *mines of the West should pay the national debt incurred in the suppression of the rebellion.*

In the face of this danger the delegation from the Pacific Coast was divided as to the proper course to be pursued to protect the mining industry.

Thus menaced from the East, which sought to unload the burden of the national debt upon the West, and hampered by the bickering among the membership of the western delegation, those who were in favor of the doctrine of freedom of exploration of all the public mineral lands, not only saw the necessity of taking what they could get, but of taking it *in any shape that would preserve the one principle of private ownership* by the first appropriator or *locator.*

Under the *impulse of this necessity* was born the law of *July 26, 1866.* Whatever may have been its faults, its crudities, its imperfections, it has the merit of being the entering wedge by means of which was established the principle of private ownership of mines as distinguished from the regalian doctrine, which up to that time had prevailed as to the mines of precious metals in this country as well as in civilized countries the world over, which regalian doctrine, according to the authorities upon the subject, *was then the existing law of the territory acquired by the United States from Mexico.*

Hence the proper definition or any definition of the extra-lateral right, as it has grown up since in our law, was a matter which might well at that time have been considered of minor importance, and so as well might be classed the matter

of limiting the surface ground, the direction of end lines, the crossing of ledges, the apex right, parallelism of end lines, and a multitude of other questions, all of which have gained an importance in the subsequent growth of the mining industry, which, at the time of the passage of the Act of 1866, were neither thought of nor provided for.

Recognizing the imminence of the danger that might lurk in the hastily constructed scheme of the Act of 1866, and the necessity for flexibility in the scheme, the Congress reserved in Sections 1 and 5 the power to make such changes, laws, regulations and amendments as to supply the additional means necessary to the complete development of the mineral resources of the country and made all titles acquired under the act, and patents issued, *express this reservation.*

Notwithstanding that the extralateral right as a principle of mining law, was an innovation upon and at variance from all other known systems, and notwithstanding its vagueness, defects and imperfections, as expressed, it was in accord with the prevailing notions and habits of the west, to claim all in sight and out of sight, and the people and the Courts received it with acclaim as being a just tribute paid by the Federal government to the deserving appropriator and miner.

The act of Congress now under consideration, in its very basic structure, deals with the *matter of disposition of the fee simple title to the mineral lands, surface by the acre*, as well as the *included vein*, at a price *per acre* of *surface*, thus in the inception of a general mining law, making a radical departure from the system of the "miners' rules."

In every step provided in the act for the acquisition of title from the government, the "exploration", the "occupation", the "diagram" accompanying application, the "entry" of such "tract", the "patent" and "payment" are all of "*land*", *superficial area of the earth's surface;* excluding and excepting all veins except the one claimed.

Sections 1 to 4 of Act of 1866.

Before the enactment of this Federal law the few adjudged cases were necessarily of State of Territorial cognizance; but upon its passage at once was begun the judicial working out by the Federal Courts of the pregnant questions arising under the law, resulting finally in the establishment of the principles

controlling and limiting the rights of the miner, (a) in his ownership beneath the surface by his rights as required and limited upon the surface, (b) as to length upon the vein, and (c) as to surface ground on each side of the vein as well as to surface form. This result has been brought about partly by judicial and partly by legislative action.

Under the act of Congress of 1866, no reported case involving the extralateral right was decided by the Federal Courts that anywise directed public attention to the imperfections of that act, or that can be said to be reflected in that *revision of the mining law* of the United States that was accomplished by the act of Congress of date May 10, 1872, entitled "An "act to promote the development of the mining resources of "the United States"; and from this follows the fact, that instead of judicial construction of the act of July 26, 1866, throwing light upon the subject, for the guidance of Congress, quite the reverse was the case, namely, the revisory act of May 10, 1872, reflected light which enabled the Courts to construe the two, the crude, primitive act of 1866 in the light of the perfected system inaugurated by the act of May 10, 1872.

This will be made clearly manifest as we review, further on, the adjudications germane to the questions here involved.

It may prove of assistance to the Court to present the salient features of the first act side by side with the correlative provisions of the second or revisory act, in so far as such provisions are material in this case.

### Mining Statute of July 26, 1866.

### Chapt. CCLXII.

**AN ACT GRANTING THE RIGHT OF WAY TO DITCH AND CANAL OWNERS OVER THE PUBLIC LANDS, AND FOR OTHER PURPOSES:**

(Usual enacting clause)—"That the mineral lands of the "public domain, both surveyed and unsurveyed, are hereby "declared to be free and open to exploration and occupation, "by all citizens of the United States, and those who have "declared their intention to become citizens, subject to such "regulations as may be prescribed by law, and subject also "to the local customs or rules of miners in the several mining "districts, so far as the same may not be in conflict with the "laws of the United States."

## Mining Statute of May 10, 1872.

### AN ACT TO PROMOTE THE DEVELOPMENT OF THE MINING RESOURCES OF THE UNITED STATES.

(Usual enacting clause)—"That all valuable mineral "deposits in land belonging to the United States, both sur- "veyed and unsurveyed, are hereby declared to be free and "open to exploration and purchase, and the lands in which "they are found to occupation and purchase, by citizens of "the United States, and those who have declared their inten- "tion to become such, under regulations prescribed by law, "and according to the local customs or rules of miners, in the "several mining districts, so far as the same are applicable "and not inconsistent with the laws of the United States."

Note.—The only material change made by the later statute is that the *lands* containing valuable mineral deposits are *open* to *exploration and purchase*.

### SEC. 2—ACT OF 1866.

"That whenever any person or association of persons claims "a vein or lode of quartz or other rock in place, bearing gold, "silver, cinnabar, or copper, having previously occupied and "improved the same according to the local customs or rules "of miners in the district where the same is situated, and "having expended in actual labor and improvements thereon, "an amount of not less than one thousand dollars, and in "regard to whose possession there is no controversy or oppos- "ing claim, it shall and may be lawful for said claimant, or "association of claimants, to file in the local land office, a "diagram of the same, so extended laterally or otherwise, as "to conform to the local laws, customs, and rules of miners, "and to *enter such tract* and receive a *patent therefor*, granting "such mine, together with the right to follow such vein or "lode, with its dips, angles and variations, to any depth, "although it may enter the land adjoining, which land adjoin- "ing shall be sold subject to this condition:

"Sec. 3 * * * But said plat, survey or description shall "in no case cover more than one *vein or lode*, and no patent "shall issue for more than *one vein or lode*, which shall be "*expressed in the patent issued.*

"Sec 4. * * * Provided, that no location hereafter "made shall exceed two hundred feet in length along the

"vein for each locator, with an additional claim for discovery "to the discoverer of the lode, with the right to follow "such vein to any depth, with all its dips, variations and "angles, together with a reasonable quantity of surface, for "the convenient working of the same, as fixed by local rules; "and provided further, that no person may make more than "one location on the same lode, and not more than three "thousand feet shall be taken in any one claim by any asso- "ciation of persons."

The corresponding provisions of the act of May 10, 1872, are sections 2 and 3 of the later act.

Section 2 of said Act reads as follows:

"That mining claims upon veins or lodes of quartz or other "rock in place, bearing gold, silver, cinnabar, lead, tin, copper, "or other valuable deposits, heretofore located, shall be gov- "erned as to length along the vein or lode by the customs, "regulations and laws in force at the date of their location. "A mining claim located after the passage of this act, whether "located by one or more persons, may equal, but shall not "exceed, 1,500 feet in length along the vein or lode; but no "location of a mining claim shall be made until the discovery "of the vein or lode within the limits of the claim located.

"No claim shall extend more than three hundred feet on "each side of the middle of the vein at the surface, nor shall "any claim be limited by any mining regulation to less than "twenty-five feet on each side of the middle of the vein at the "surface, except where adverse rights existing at the passage "of this act, shall render such limitation necessary. The end "lines of each claim shall be parallel to each other."

Section 3 of said Act reads as follows:

"That the locators of all mining locations heretofore made, "or which shall hereafter be made, on any mineral vein, lode "or ledge, situated on the public domain, their heirs and "assigns, where no adverse claim exists at the passage of this "act *so long as they comply with the laws of the United States* and "the State, territorial and local regulations not in conflict "with said laws of the United States governing their posses- "sory title, shall have the exclusive right of possession and "enjoyment of all the surface included within the lines of "their locations and of all veins, lodes and ledges throughout "their entire depth, the top or apex of which lies inside of "such surface lines extended downward vertically, although

"such veins, lodes or ledges may so far depart from a perpen-
"dicular in their course downward as to extend outside the
"vertical side lines of such surface locations. Provided that
"their right of possession to such outside parts of such veins
"or ledges shall be confined to such portions thereof as lie
"between vertical planes drawn downward as aforesaid
"through the end lines of their locations, so continued in their
"own direction that such planes will intersect such exterior
"parts of said veins or ledges. And that provided further
"nothing in this section shall authorize the locator or pos-
"sessor of a vein or lode which extends in its downward course
"beyond the vertical lines of his claim to enter upon the sur-
"face of a claim owned or possessed by another."

Here must be noticed many radical changes in the mining law wrought by the Act of 1872, the chief among which are:

1. That claims theretofore located should be governed as to *length* by customs, regulations and laws in force at the date of their location; but by the following provision of the section *all* claims as to maximum and minimum *width* are governed by this section.

2. Limiting locations in length to one thousand five hundred feet.

3. Providing that no location shall be made until discovery of the vein or lode within the limits of the claim located.

4. Providing a maximum of three hundred and a minimum of twenty-five feet of *surface width* of a claim, measured from the middle of the vein *at the surface*.

5. The end lines of each claim shall be *parallel to each other*.

All these provisions by their express terms, except that as to length along the vein of claims located prior to May 10th, 1872, clearly apply to *all claims located before as well as after that date*.

*In section three* the following elements are new to the mining statute:

1. That the locators of all mining locations "heretofore "made or hereafter to be made * * * so long as they "comply with the laws of the United States * * * shall "have the *exclusive right* of possession and enjoyment" of (a) *all* the *surface* included within the lines of their locations (b) and of all veins, lodes and ledges throughout their entire depth (c) the top or apex of which lies inside of such surface lines (d) extended downward vertically (e) although such

veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of said surface locations.

2. Then follows the proviso quoted in the third section defining the planes between which the exercise of the extra-lateral right is confined.

By section nine of the Act of May 10, 1872, a plan is provided for the engrafting of the new law upon the old in this wise:

"That sections one, two, three, four and six of an act "entitled 'An Act granting the right of way to ditch and "'canal owners over the public lands, and for other pur-"'poses', approved July 26th, 1866, are hereby repealed, but "such repeal shall not affect existing rights. Applications for "patents for mining claims now pending may be prosecuted "to a final decision in the General Land Office; *but in such "cases* where adverse rights *are not affected thereby, patents "may issue in pursuance of the provisions of this act.*"

This language clearly implies that if *adverse rights* were affected by such repeal, then the patent would issue under the law of 1866. In the case of the Pioneer application for a patent, which was then pending, no adverse rights were to be affected, and the applicant *elected to take patent under the provisions of the law of 1872, and thereby elected to have applied the restrictions and limitations of that act*, in consideration of the enlarged rights given under that act.

This right of election must not be confused with the enlargement given by the succeeding clause of section nine to patents *theretofore* issued under the act of 1866, for the reason that the claims so situated were out of the land office, not subject to amendment as to surveys, and not any longer subject to administration or correction in any way, so as to make them conform to the requirements of the new law. Not so the application for the Pioneer claim. Its survey could be amended, its lines could be reformed, its end lines, as in Doe vs. Waterloo, 54 Fed., 935, could be made parallel, since the patent did not issue until August 12, 1872, more than three months after the enactment of the law of May 10, 1872. Neither does the proviso in section 16 save the patent of the Pioneer claim from the effect of such *election*. It was not the *repeal of acts inconsistent* with the act of 1872 that took away the extralateral right of the Pioneer claim, if it ever had any,

*but it was electing* to take the *patent under the law of 1872 with its enlarged benefits, and the acceptance of such a patent, rather than to take its patent for one vein or ledge under the act of 1866.*

To make this position clearer by a different form of statement:

The words are, "but such repeal shall not affect existing rights". The existing rights *were to buy one vein* limited by the number of feet, etc., with *necessary* surface, under the act of 1866; or, if owner did not want a patent, to hold it indefinitely under the act of 1866; or such an owner might apply to purchase under section six of the act of 1872 and procure a patent under that act, by *complying with its provisions.*

That was not done in this case, for in this case the *application was pending,* and upon the change of the law by the passage of the act of 1872, applicant, finding his end lines not parallel, and that he stood to lose all right to the outside parts of his vein, should have withdrawn his application and proceeded *anew* under section six of the new law, or he should have asked to have his survey amended so as to *parallel* his end lines; but the applicant for the Pioneer claim *did neither* of these things, and took patent under the act of 1872, with divergent end lines.

After May 10, 1872, there was no such *possibility as that of a patent being issued under the act of 1866,* excepting when adverse rights existed.

Whether patents bearing date anterior to May 10, 1872, carried extralateral rights irrespective of parallelism of end lines, is immaterial in this case, for this patent having been issued *after that date* cannot *fall within the purview of the words of the last sentence of section nine of the act of May 10, 1872, which refers to patents theretofore issued.*

Consideration so far having been given to:

1. The historical conditions out of which the act of 1866 was passed, and

2. The terms of the act of 1866, and

3. The terms of the act of 1872: It remains to apply to the questions in hand the decisions of the Federal Courts construing these Federal statutes, all of such questions, in their very nature, being federal.

## JURISDICTION.

In support of the jurisdiction herein, in addition to the authorities cited in the brief of plaintiff in error answering the motion to dismiss and affirm for want of jurisdiction, plaintiff in error cites the following from the opinion of Mr. Justice McKenna, delivered in *Calhoun Gold Mining Co.* v. *Ajax Gold Mining Co.*, 182 U. S., 499.

"The rights of the parties are based on, and their deter-
"mination hence involves the construction of, the following
"sections of the Revised Statutes of the United States,
"empowering the location of mining claims:

* * * * * * * * *

"There are serious objections to accepting that consequence
"as determinative of our judgment. We might by doing so
"confirm titles in Colorado, but we might disturb them else-
"where. The statute construed is a Federal one, being a
"law, not only for Colorado, but for all of the mining States,
"and, therefore, a rule for all, not a rule for one, must be
"declared. Besides, what consideration should have been
"given to prior cases the Supreme Court of the State was
"better able to judge than we are. It may be that the repose
"of titles in the State was best effected by the reversal of the
"prior cases. At any rate, a Federal statute has more than
"a local application, and until construed by this Court cannot
"be said to have an established meaning. The necessity of
"this is illustrated, if it need illustration, from the different
"view taken of sections 2322 and 2336 in California, Arizona,
"and Montana, from that taken in the prior Colorado cases.
"The Supreme Courts respectively of those States and that
"Territory have adjudged a superiority of right to the cross
"veins to be in the senior location. Manifestly, on account
"of this difference, if for no other, this Court must interpret
"the sections independently of local considerations."

The right of plaintiff in error to the disputed ores, which lie within the segment of the "Silva" patented claim, Lot No. 86, is an inevitable consequence of such ownership of the land in which such ores are contained, as against defendant in error, whose claim to such ores, as will be shown, is not predi-

cated upon the existence of those conditions upon which alone an invasion of such Silva area is allowed by the mining law.

Leadville Mg. Co. v. Fitzgerald, Fed. Cases, No. 8158;
Cheesman v. Shreve, 37 Fed., 36;
Duggan v. Davey, 26 N. W., 887;
Doe v. Waterloo, 54 Fed., 935;
Iron Silver v. Elgin, 118 U. S., 98;
King v. Amy, 152 U. S., 222;
Argonaut Consol. M. & M. Co. v. Turner, 48 Pac., 685;
Del Monte v. Last Chance, 171 U. S., 55.

No right of invasion of the Silva area is asserted by defendant in error, other than that based on its ownership of the Pioneer quartz mine, Lot No. 48, and of its ownership of 1,589 94/100 feet of that certain vein apexing therein, which upon its downward course extends within such Silva area.

Record, pages 2 to 5 and page 30.

The titles to both the Pioneer quartz mining claim, Lot No. 48, and the Silva quartz mining claim, Lot No. 86, are creatures existing only under and by virtue of the mining laws of the United States, and hence are limited in their nature and attributes by such laws.

One of the controlling conditions of the mining law of the United States which limits the granting of any extralateral right upon an entry of mineral public land, is that "*the end lines of each claim shall be parallel to each other.*" Act of May 10, 1872, Sec. 2.

Under the patent of the Pioneer claim, Lot No. 48, issued under Act of May 10, 1872, the defendant in error claims the right to follow the vein into the Silva patented area between the extended planes of the end lines of the Pioneer claim, which end lines are not parallel to each other, but are to the extent of 14° 45′ divergent from each other in the direction of the dip of the vein, *to the result that upon the level of the ores in dispute, underneath the surface, such asserted claim embraces upon the course or strike of the vein four hundred feet more in length on the vein than the length of the apex of the vein measured between the end lines of the claim upon the surface.*

This contention of defendant in error, is, by the judgment of the State Court in this case, declared to be the law, and

upon it is based the granting of the relief as to the damages and the restraining injunction awarded to defendant in error.

Record, pages 34 to 36.

The limitation as to length of the vein upon and beneath the surface has always been one and the same, under the rules of the miners as well as under the statutes of the United States, and was always recognized everywhere as *absolutely controlling* in its effect upon the rights of mine owners.

If defendant in error can get damages from plaintiff in error and enjoin it from mining at the Northerly end of this *expanded and continually growing length under ground*, it can at the same time obtain the same relief at the southerly end, and in the language of Justice Field, "oust all his neighbors and take the whole ledge." Eureka Case, 4 Saw., p. 322.

This limitation as to *length upon the course or strike of the* vein from the surface downward, is one as to which all systems, rules of miners, Territorial, State and Federal statutes, and the decisions of all the Courts, have been of one voice from the beginning, with the sole exception of the judgment entered in this case.

It may fairly be anticipated that the justification of the decision of the State Court in this case will be placed upon the grounds assumed by defendant in error in that Court as shown by the brief of counsel for plaintiff there (defendant in error here), as follows:

"As a matter of *presumption*, the owner of a mining claim, "*prima facie*, owns everything underneath its surface, *usque ad* "*orcum*, and that the burden is upon the outside apex proprie- "tor, to show his right to penetrate underneath the surface "of another claim overlying the dip of the vein.

* * * * * * * * * * * *

"we admit that the weight of authority casts the burden upon "the outside apex proprietor, and that the burden never shifts "during the trial."

* * * * * * * * * * * * *

"We take up this burden cheerfully, and *thus outline our* "*contention:*

I.

"The title of the Argonaut Company to the Pioneer or "Argonaut Mine originated, ripened, and became vested in

"its predecessors under the act of July 26, 1866. This act did "not, either in terms or inferentially, require end lines to be "parallel, and no consequence is attached to a deviation from "parallelism.

* * * * * * * * * * * *

II.

"Although the end lines were not required to be parallel "under the act of 1866, yet if by any process of reasoning any "limitation upon the extralateral right was imposed upon the "locator's title, by reason of the divergence of the end lines, "such limitation was removed by the Act of May 10, 1872, "which granted to owners of locations theretofore made the "right to pursue the vein on its downward course, between "the end line planes of such location as it then existed.

III.

"The title evidenced by the certificate of purchase, issued "prior to the passage of the Act of 1872, was the complete "equitable title, equivalent for all practical purposes to the "issuance of a patent. Congress could not deprive the pur-"chaser of any rights acquired under that certificate, nor cast "upon such purchaser any additional burdens. It is quite "manifest, however, that Congress never intended that the "estate of any mining locator, held prior to May 10, 1872, "should suffer any diminution or curtailment by reason of "the Act passed on that day.

IV.

"The patent of the United States issued to the predecessor "in title of the Argonaut Company in terms grants the vein "throughout its entire depth, between the end lines described "in the patent, and these lines extended in their own direc-"tion. The Land Department had jurisdiction of the subject "matter. If more was given than the patentee should have "had, it is a question between the government and the paten-"tee; outsiders cannot collaterally assail the patent.

V.

"The Courts cannot construct end lines. The end lines "described in a patent issued by the Executive cannot be read-

"justed by the Judiciary. The extralateral rights of the "Pioneer must be determined by the calls of the patent in "connection with the law under which the right to it became "perfected, and the physical facts as to the course of the vein "through the ground.

VI.

"If this be not true, the only method for adjusting inequali- "ties for which any judicial precedent can be found, is an- "nounced in the Eureka Case, i. e., lines drawn at right angles "to the course of the vein—at the extreme points on the vein. "The application of this theory will give all the ore bodies in "dispute (and more) to the Argonaut Company.

VII.

"The Kennedy Mining and Milling Company, by reason of "its acts and conduct, and that of its predecessors in title, are "estopped from asserting that the Argonaut Mining Company "has no extralateral right in the vein in dispute."

To the first contention of defendant in error we make reply—

(1) That the owner of the Argonaut or Pioneer mine *did not have a title ripened and vested* under the act of Congress of July 26, 1866, no patent having been issued until after the repeal of that act and the enactment of the mining law of May 10, 1872, and that at the date last mentioned the title, both under general law, and under the provisions of sections one and five of the act of July 26, 1866, was still in *course of administration, and Congress had the reserved power of change and amendment* of the law which power was exercised by the enactment of the law of May 10, 1872.

After the passage of the Act of 1872, the owner of a location made under the Act of 1866 could obtain a patent under the provisions of that act where adverse rights existed or he could patent under the Act of 1872.

New Dunderberg v. Old, 79 Fed., 598.

But the rights of the patentee are restricted by the law under which the patent issued.

New Dunderberg v. Old, 79 Fed., 598.
Walrath v. Champion, 171 U. S., 507.

In cases of claims entered but not patented before the passage of the Act of 1872, the U. S. Land Department has jurisdiction to hear and determine whether the patent should not issue according to the provisions of the Act of 1872.

New Dunderberg v. Old, 79 Fed., 598.
Del Monte v. Last Chance, 171 U. S., 55.
Michigan v. Rust, 168 U. S., 589.
Brown v. Hitchcock, 173 U. S., 473.
Hawley v. Diller, 178 U. S., 476.

The Act of 1872 imposed such hearing on the Land Department as a duty.

New Dunderberg v. Old, 79 Fed., 598.

And see

Michigan v. Rust, 168 U. S., 589.

In such cases the issuance of the patent according to the provisions of the Act of 1872, is conclusive of the hearing and of all matters necessary thereto, including notice.

New Dunderberg v. Old, 79 Fed., 598.
Brown v. Hitchcock, 173 U. S., 473.

These cases clearly show that at any time before the patent itself issues, the Land Department may modify an entry so as to make it conform to the law.

In Michigan vs. Rust, *supra*, it is said:

"It is true a patent is not always necessary for the transfer "of the legal title. Sometimes an Act of Congress will pass "the fee" (cites authorities). "Sometimes a certification of "a list of lands to the grantee is declared to be operative to "transfer such title (Rev. Stat., Sec. 2449; Frasher v. O'Con-"nor, 115 U. S. 102). *But wherever the granting Act specifically "provides for the issue of a patent, then the rule is that the legal "title remains in the government until the issue of the patent* (Bag-"nell v. Broderick, 38 U. S., 13 Pet. 426-450); *and while so re-"maining the grant is in process of administration, and the juris-"diction of the Land Department is not lost.*"

In Del Monte vs. Last Chance, *supra*, it is said:

"By Section 2319, quoted above, the mineral deposits which "are declared to be open to exploration and purchase are

"those found in lands belonging to the United States, and "such lands are the only ones open to occupation and pur- "chase.

"*While this is true, it is also true that until the legal title has "passed the public lands are within the jurisdiction of the Land "Department, and, although equitable rights may be established, "Congress retains a certain measure of control. Michigan Land "and Lumber Company v. Rust, 168 U. S., 589. The grant is, as "is often said, in process of administration.* Passing to Section "2320, beyond the recognition of the governing force of cus- "toms and regulations and a declaration as to the extreme length "and width of a mining claim, *it is provided that 'no location of "'a mining claim shall be made until the discovery of the vein or "'lode within the limits of the claim located. * * * The end "'lines of each claim shall be parallel to each other.'*"

Here the power of Congress to modify an entry is directly asserted, the particular exercise of that power referred to being the granting of the privilege of going on another's location at any time before patent, and there setting stakes *for the purpose of making parallel the end lines of an outside location;* and this, notwithstanding the doctrine of Belk vs. Meagher, 104 U. S., 279, and Gwillim vs. Donellan, 115 U. S., 45, both of which are cited by the Court to the effect that a valid location of mineral lands "has the effect of a grant by the United "States of the right of present and exclusive possession of the "land located."

The Act of July 26, 1866, by express terms reserves in Congress the right to change the system of mining upon the lands of the United States, as well as the system of making government sales of such lands.

By Section 1 it is provided: "That the mineral lands of "the public domain, both surveyed and unsurveyed, are hereby "declared to be free and open to exploration and occupation "by all citizens of the United States, and those who have "declared their intention to become citizens, *subject to such "regulations as may be prescribed by law*, and subject also to the "local customs or rules of miners in the several mining dis- "tricts, *so far as the same may not be in conflict with the laws of the "United States.*"

By Section 5 of the same Act, it is provided. "That, as a "further condition of sale, in the absence of necessary legisla- "tion by Congress, *the local legislature of any state or territory*

"*may provide rules for working mines, involving easements, drain-*
"*age, or other necessary means to their complete development;* and
"those conditions shall be fully expressed in the patent."

This section was not repealed, and is yet law, and is found to be preserved in section 2338 R. S. U. S.—and such condition is set out in the Pioneer patent.

Record, page 28.

Thus the right of amendment and change of the law, both as to occupation and sales of mineral lands of the United States, is not only reserved but it is made a part of every government patent or conveyance of mineral land under the Act of 1866, and such condition *must* be expressed therein.

The provisions of section 4 of the same Act do not expressly declare any method of defining the vertical planes within which the right is given to follow the vein or lode into the land adjoining, although specifically prescribing the length along a lode that may be located "to any depth;" and hence arose difficulties such as those which were afterwards presented to the Courts in the Kenney, Eureka and other cases. The difficulties so encountered made necessary the exercise by the Congress of its paramount powers and especially of the powers reserved in the 1st and 5th sections above quoted, by revising and amending the law of 1866, as was done by the statute of May 10, 1872.

The exercise of such a power reserved in the original act is not an "impairment" of rights or titles acquired subject *to such power.*

The liberty of surface form allowable in locations made under the law of 1866 had no other nor greater significance than that under the law of 1872.

In Iron Silver Mining Co. v. Elgin Mining & Smelting Co., 118 U. S., 196, it is said: "Under the act of 1866, parallelism in the end lines of a surface location was not required." But, while construing this language, the court say, in Walrath v. Champion Mg. Co., 171 U. S., 293: "It may be that there was "liberty of surface form under that act" (the act of 1866) "but "the law strictly confined the right on the vein below the sur-"face. There is liberty of surface form under the act of 1872. "It was exercised in Iron Silver Mining Co. v. Elgin Mining & "S. Co., *supra*, in the form of a horseshoe; in Montana Co., Lim-

"ited, v. Clark, 42 Fed. Rep., 626, in the form of an isosceles "triangle."

For the shape of the Non-Consolidated claim in King vs. Amy, 152 U. S., 222, see Diagram G[1] on page 58.

The mining right was bounded by parallel end lines under the rules of miners before the passage of the Act of 1866.

In the Eureka case, 4 Sawy., 322, it is said:

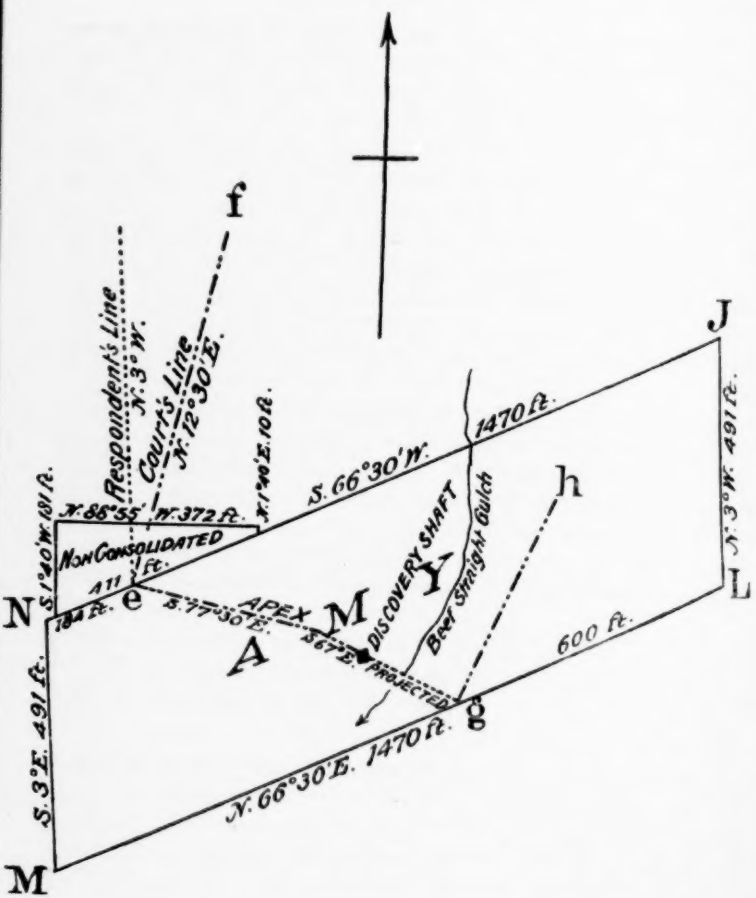
"It is true that end lines are not in terms named in the rules "of the miners, but they are necessarily implied, and no rea- "sonable construction can be given to them without such "implication.

"If this were not so, he might by the bend of his vein hold "under the surface along the course of the ledge double and "treble the amount he could take on the surface. Indeed, "instead of being limited by the number of feet prescribed by "the rules, he might in some cases oust all his neighbors and "take the whole ledge. *No construction is permissible which "would substantially defeat the limitation of quantity on a ledge, "which was the most important provision in the whole system of "rules.*

"*Similar rules have been adopted in numerous mining districts, "and the construction thus given has been uniformly and everywhere "followed. We are confident that no other construction has ever been "adopted in any mining district in California or Nevada*; and the "construction is one *which the law would require in the absence of "any construction by miners.* If, for instance, the State were "to-day to deed a block in the city of San Francisco to twenty "persons, each to take twenty feet front in a certain specified "succession, each would have assigned to him *by the law* a "section parallel with that of his neighbor of twenty feet in "width cut through the block. No other mode of division "would carry out the grant."

This universal rule of the miners thus clearly defined by the court in the Eureka Case, is perfectly represented by Diagram O (see page 59), which is a copy of the diagram used by Judge Sawyer in illustrating his decision in Kinney v. Cons. Va. Mg. Co., 4 Sawy., 382, to show the method of locating on the Comstock. The end lines of each claim were parallel to each other and all were drawn at right angles to a datum line agreed upon as representing the strike or direction of the lode.

# Diagram G[1]


f
Respondent's Line
N. 3° W.
Court's Line
N. 12° 30' E.
J
1470 ft.
S. 66° 30' W.
N. 3° W. 491 ft.
L
h
N. 85° 55' W. 372 ft.
N. 1° 40' E. 10 ft.
S. 1° 40' W. 101 ft.
NON CONSOLIDATED
411 Ft.
N
e
184 ft.
S. 77° 30' E.
APEX
M
Y
A
S. 67° E.
DISCOVERY SHAFT
Beaf Straight Gulch
600 ft.
PROJECTED
g
S. 3° E. 491 ft.
N. 66° 30' E. 1470 ft.
M

# Diagram O.


W.
Mason's or Complainant's Base and Course of Lode as claimed by Complainant
W. & M. SHAFT
KINNEY'S & CENTRAL No 2 SHAFT
N. 10° E.
Freeman or Defendant's Base and Course of Comstock Lode as claimed by Defendant
N. 5° W.
STAKE
50
210 ft.
933-7
215 ft.
500 ft.
50
100 ft.
300 ft.
150 ft.
200 ft.
100 ft.
S.
N.
1200 Level
KINNEY MASON BASE
CON. VA. SHAFT
0 Level
GOULD & CURRY
BEST & BELCHER
SIDES
WHITE & MURPHY
KINNEY, FREEMAN OR DEFENDANT'S BASE
CENTRAL No 2
CALIFORNIA
CENTRAL
OPHIR
MEXICAN
Course of end lines of all claims except Kinneys, at right angles to Freeman's Base.
E.

The mining right was bounded by parallel end lines under the law of 1866.

Section 4 of the act of July 26, 1866, provides "that no "location hereafter made *shall exceed 200 feet in length along* "*the vein* for each locator, with an additional claim for dis- "covery to the discoverer of the lode, with the right to follow "*such vein to any depth*, with all its dips, variations and angles."

It would appear to require no interpretation to show the intention of this language to be that a locator might locate the vein for the distance of only 200 feet, and that he was to be restricted on the dip of the vein within the particular distance of 200 feet located. And it is clear that such restriction on the dip would be physically impossible except by means of parallel end lines.

While interpreting this section of the Act of 1866, the court in the Eureka Case, after defining the universal rule of the mining districts concerning end lines, as above quoted, say, 4 Sawy., 323:

"The Act of 1866 in no respect enlarges the right of the "claimant beyond that which the rules of the mining district "gave him. The patent which the act allows him to obtain "does not authorize him to go outside of the end lines of his "claim, drawn down vertically through the ledge or lode. "it only authorizes him to follow his vein, with its dips, angles "and variations to any depth although it may enter land "adjoining, that is, land lying beyond the area included "within his surface lines. It is land lying on the side of the "claim, not on the ends of it, which may be entered. The land "on the ends is reserved for other claimants to explore. "* * * But the line of location taken does measure the "extent of the miner's right. That must be along the general "course, or strike, as it is termed, of the ledge or lode. Lines "drawn vertically down through the ledge or lode at right "angles with a line representing this general course at the "ends of the claimant's line of location, will carve out, so to "speak, a section of the ledge or lode within which he is "permitted to work and out of which he cannot pass."

The rule thus defined was the one finally adopted by the court in rendering its decision.

In Flagstaff v. Tarbet, 98 U. S., 463, it is said:

"But our laws have attempted to establish a rule by which "each claim shall be *so many feet of the vein lengthwise of its*

"*course to any depth below the surface*, although laterally its "inclination shall carry it ever so far from a perpendicular."

Again:

"The Act of 1872, 17 Stat. at L. 91, is more explicit in its "terms; but the intent is undoubtedly the same as it respects "end lines and side lines and the right to follow the dip out "side the latter."

(The Flagstaff case was a construction of a patent issued under the law of 1866.)

In Walrath v. Champion, 171 U. S., 293, the court first comments approvingly on the language last above quoted from the Flagstaff case, and adds:

"This law was followed and applied in Argentine Mining "Company v. Terrible Mining Co., 112 U. S., 478; and in "Iron Silver Mining Company v. Elgin Min. & S. Co., 118 "U. S., 222. *The locations passed upon in these cases were made "under the Act of 1872, but we have seen that the intent of that "Act and the Act of 1866, 'as it respects end lines and side lines,' "was the same.*"

Again: "It may be that there was liberty of surface form "under that act" (the act of 1866) "but the law strictly con- "fined the right on the vein below the surface."

A surface location under the law of 1866 bounds the extent of the mining right.

Section 4 of the Act of 1866 provided:

"No location hereafter made shall exceed 200 feet in length "along the vein for each locator with an additional claim for "discovery to the discoverer of the lode, with the right to "follow such vein to any depth with all its dips, variations "and angles, together *with a reasonable quantity of surface for "the convenient working of the same.*"

On this point it was held in the Eureka Case, 4 Sawy., 323, as follows:

"It is true, as stated by the defendant, that the surface "land taken up in connection with a linear location on the "ledge or lode is, under the Act of 1866, intended solely for "the convenient working of the mine, and does not measure "the miner's right, either to the linear feet upon its course "or to follow the dips, angles and variations of the vein, or "control the direction he shall take."

But, less than five years afterwards, the Supreme Court of the United States said in the Flagstaff case, 98 U. S., 463:

"The court refused to give the following instructions pro-
"pounded by the plaintiff in error, to wit: 'By the Act of
"'Congress of July 26, 1866, 14th Stat. at L. 253, under which
"'all these locations are claimed to have been made, it was
"'the vein or lode of mineral that was located and claimed;
"'the lode was the principal thing, and the surface area was
"'a mere incident for the convenient working of the lode;
"'the patent granted the lode as such, irrespective of the
"'surface area, which an applicant was not bound to claim;
"'it was his convenience for working the lode that controlled
"'his location of the surface area, and the patentee under
"'that act takes a fee simple title to the lode, to the full
"'extent located and claimed under said Act.'

* * * "It was not the intent of the law to allow a per-
"son to make his location crosswise of a vein so that the side
"lines shall cross it, and thereby give him the right to follow
"the strike of the vein outside of his side lines. That would
"subvert the whole system sought to be established by the
"law. If he does locate his claim in that way his rights must
"be subordinated to the rights of those who have properly
"located on the lode. Their right to follow the dip outside of
"their side lines cannot be interfered with by him. *His right*
"*to the lode only extends to so much of the lode as his claim covers.*
"If he has located crosswise of the lode and his claim is only
"100 feet wide, that 100 feet is all he has a right to. This
"we consider to be the law as to locations on lodes or veins."

In Del Monte M. & M. Co. v. Last Chance M. & M. Co., 171 U. S., 55, it is said:

"Even under this statute" (the Act of 1866) "although its
"express purpose was primarily to grant the single vein, *yet*
"*the rights of the patentee beneath the surface were limited and con-*
"*trolled by his rights upon the surface.* If, in fact, as shown by
"subsequent explorations, the vein on its course or strike
"departed from the boundary lines of the surface location,
"the point of departure was the limit of right. In other
"words, he was not entitled to the claimed and patented num-
"ber of feet of the vein, irrespective of the question whether
"the vein in its course departed from the lines of the surface
"location."

Then follows a review of the Flagstaff litigation:

"These decisions" (McCormick v. Varnes, 2 Utah, 355, and the Flagstaff case) "show that while the express purpose of "the statute was to grant the vein for so many feet along its "course, yet such grant could only be made effective by a sur- "face location covering the course to such extent."

See also:

Cons. Wyoming v. Champion, 63 Fed., 540;
Walrath v. Champion, 171 U. S., 293;
Carson City v. North Star, 73 Fed., 597.

The courts have no power to make end lines.

Elgin v. Iron Silver, 14 Fed., 377;
Iron Silver v. Elgin, 118 U. S., 196;
King v. Amy, 152 U. S., 222;
Del Monte v. Last Chance, 171 U. S., 55.

The same end lines bound the extralateral right to all lodes the apices of which lie within the vertical boundaries of the claim.

Iron Silver v. Elgin, 118 U. S., 196;
Del Monte v. Last Chance, 171 U. S., 55;
Walrath v. Champion, 171 U. S., 293.

Contention 2 of defendant in error, is that the act of May 10, 1872, so enlarges the rights of one who has located a claim with surface end lines that are not parallel but diverge in the direction of the dip of the vein, is entitled to all the space between the planes of his end lines extended in their respective directions, so as to "oust all his neighbors" and take, if therein, all of the ledge.

The only authority for this pretense found in the books anywhere is contained in Lindley on Mines section 598 to section 600.

All of the statutes and cases on mining oppose such a result as being impossible under any laws of the United States, as is abundantly shown herein.

Contentions 3 and 4 relating to the entry, payment and issuance of receipt before May 10, 1872, for the Pioneer Mine, and the issuance of the patent therefor on August 12, 1872, in so

far as the same have not already been answered, will be treated together.

Notwithstanding the fact that the entry of and payment for the Pioneer Mine were made under the act of 1866, yet the property and title remained subject to administration, as before shown, and not only this, but the applicant, failing to withdraw the application entirely, or to have the survey corrected so as to make the end lines parallel, thereby voluntarily waived all claim to the extralateral right, which attaches only in cases of parallelism.

Act of 1872, Secs. 2 and 3.

In Hamilton Gaslight & Coke Company v. City of Hamilton, 146 U. S., 258 to 271, this court has said: "A legislative "grant to a corporation of special privileges, if not forbidden "by the Constitution, may be a contract; but where one of "the conditions of the grant is that the legislature may alter "or revoke it, a law altering or revoking, or which has the "effect to alter or revoke, the exclusive character of such priv-"ileges, cannot be regarded as one impairing the obligation of "the contract, whatever may be the motive of the legislature, "or however harshly such legislation may operate, in the "particular case, upon the corporation or parties affected by "it. The corporation, by accepting the grant subject to the "legislative power so reserved by the Constitution, must be "held to have assented to such reservation."

In William W. Gibbs v. The Consolidated Gas Company of Baltimore City, 130 U. S., pages 396-412, this Court uses the following language: "The consent of the corporation was not "required to the operation of such a provision as that em-"bodied in the fourth section of the act of 1882, but if accept-"ance were necessary, the exercise of corporate action by this "gas company after the passage of the amendment was suffi-"cient evidence of such acceptance."

In the Pennsylvania College Cases, 80 U. S., 190-222, this Court has said: "Authorized as the Act of the Legislature "was by the reservation contained in the original charter, and *'sanctioned as the Act was by having been adopted by the corpora-"tors, it is clear to a demonstration that the Act uniting the two "colleges was a valid Act, and that the two original corporations "became merged in the one corporation created by the amendatory "and enabling Act passed for that purpose. * * * Accepted as*

*"that Act was by the trustees of the original institutions, they not "only ratified the reservation contained in the 5th section of the "Charter of Jefferson College, but they in express terms adopted the "changes made in the amended charter uniting the two institutions "in one corporation."*

In Central Pacific R. R. Co. v. Gallatin, 99 U. S., 727-769, this Court uses the following language: "Each of the com- "panies was required to file in the Department of the Interior "its acceptance of the conditions imposed, before it could "become entitled to the benefits conferred by the Act. This "was promptly done by the Central Pacific Company, and *in "this way* that corporation voluntarily submitted itself to such "legislative control by *Congress as was reserved* under the "power of amendment."

And see Botillier v. Dominguez, 130 U. S. 238.

The granting of an extralateral right by the terms of a patent issued by the officers of the United States upon an entry of mining land, in violation of the conditions imposed by law governing the making of such a grant, is void.

Northern Pac. v. Cannon, 54 Fed., 252.
Doolan v. Carr, 125 U. S., 624.
Davis v. Wiebbold, 139 U. S., 507.
Francoeur v. Newhouse, 40 Fed., 618.
Rose v. Richmond, 17 Nev., 25.
Richmond v. Rose, 114 U. S., 576.
Best v. Polk, 18 Wall., 112.
Sherman v. Buick, 3 Otto, 209.
Smelting Co. v. Kemp, 104 U. S., 641.
Wright v. Rosebury, 121 U. S., 488.
Deffeback v. Hawke, 115 U. S., 392.
Lakin v. Dolly, 53 Fed., 333.
Lakin v. Roberts, 54 Fed., 461.

A case where exactly the same thing was done that plaintiff in error claims should be done in the case at bar, is the case of Iron Silver Mg. Co. v. Elgin M. & S. Co., 118 U. S., 196.

Diagram J illustrates that case. (See page 66.)

In that case the patent for the Stone claim contained a grant of a segment of land, and, nominally, a grant of the extralateral right. The patent contained only the usual exceptions and reservations.

# Diagram J.


Surv. No 490
GILT EDGE
(Disputed Ground)
STONE
Outcrop
Center Line
of
Apex
and
Surv. No 217
North End Line
Direction of Dip
Direction of Strike
South End Line
Side
Lode
1
2
3
4
5
6
7
8
9
10
11
12
13
14

In deciding the case the court say: "We are, therefore, of "opinion that the objection that by reason of the surface form "of the Stone claim, the defendant could not follow the lode "existing therein in its downward course beyond the lines of "the claim, was well taken to the offered proof."

The conclusion of the court is that, *while the grant of the land segment was good, the attempted grant of the extralateral right in connection therewith was absolutely void as against law.*

And so here we claim that, although the grant of Lot 48 was good, the attempted grant of the extralateral right in connection therewith was absolutely void as against law.

As to the government only having the right to complain of this patent being void as to the extralateral right, we reply that under its patent to the Silva mine, Lot No. 86, plaintiff in error is the *grantee of the government*, and has *whatever rights the government had.* Plaintiff in error is in precisely the same position as were the owners of the Stone claim in the case just cited.

The fifth ground of contention is to the effect that "the "Courts cannot construct end lines. The end lines described "in a patent issued by the Executive cannot be readjusted "by the Judiciary. The extralateral rights of the Pioneer "must be determined by the calls of the patent in connection "with the law under which the right to it became perfected, "and the physical facts as to the course of the vein through "the ground."

All this meets with our hearty concurrence.

The sixth ground of contention of defendant in error, is the anthithesis of the last above, and is only stated to be true, alternatively, that is:

"If this be not true, the only method for adjusting inequali- "ties for which any judicial precedent can be found, is "announced in the Eureka case, i. e. lines drawn at right "angles to the course of the vein—at the extreme points on "the vein. The application of this theory will give all the ore "bodies in dispute (and more) to the Argonaut Company."

This is the ground taken by the Supreme Court of the State of California in its opinion in this cause but by its judgment *affirming the judgment of the court below, all the ledge between divergent end lines* was given to defendant in error.

Granting that the doctrine claimed can be extracted from

the opinion announced by the Circuit Court in the Eureka case, still that doctrine has been long abandoned.

The settled rule is as stated below.

The Flagstaff case (98 U. S., 463) construed a patent issued under the law of 1866, and compared that law with that of 1872, using this language:

"The language of the Act of 1866, 14 Stat. at L., 251, in rela-
"tion to 'a vein or lode' is, 'That no location hereafter made
"'shall exceed two hundred feet in length *along the vein* for
"'each locator, with an additional claim for discovery to the
"'discoverer of the lode, with the right to follow such vein
"'*to any depth*, with *all its dips, variations and angles*, together
"'with a reasonable quantity of surface for the convenient
"'working of the same as fixed by the local rules,' etc. The
"Act of 1872, 17 Stat. at L. 91, is more explicit in its terms;
"but the intent is undoubtedly the same, as it respects end
"lines and side lines, and the right to follow the dip outside of
"the latter.

* * * * * * * * *

"As the law stands, we think that the right to follow the dip
"of the vein is bounded by the end lines of the claim, properly
"so called, which lines are those which are crosswise of the
"general course of the vein on the surface."

In King v. Amy Cons. M. Co. (152 U. S., 227-8), reversing the Supreme Court of Montana, this court says:

"It is evident from the provisions cited" (R. S. of U. S., Sec. 2324) "that the location as made and defined must control not
"only the rights of the claimant to the vein or lode within its
"surface lines, but also any lateral rights."

* * * * * * * * *

"The court cannot become a locator for the mining claimant
"and do for him what he alone should do for himself. The
"most that the court can do, where the lines are drawn inac-
"curately and irregularly, is to give to the miner such rights
"as his imperfect location warrants, under the statute. It
"cannot relocate his claim and make new side lines or end
"lines."

In Iron Silver M. Co. v. Elgin M. & S. Co., 118 U. S., 196, it is held:

"The provision of the statute, that the locator is entitled
"throughout their entire depth to all the veins, lodes or

"ledges the top or apex of which lies inside of the surface lines "of his location, tends strongly to show that the end lines "marked on the ground must control. It often happens that "the top or apex of more than one vein lies within such sur- "face lines, and the veins may have different courses and "dips, yet his right to follow them outside of the side lines of "the location must be bounded by planes drawn vertically "through the same end lines. The planes of the end lines can- "not be drawn at a right angle to the courses of all the veins "if they are not identical.

* * * * * * * * *

"If it is expedient to change the rule, legislative action "should be invoked, as it would operate only in the future, "and not judicial decision which would affect past cases as "well.

"This view of the controlling effect of the end lines of the "surface location is also sustained by the decision of this court "in the Flagstaff Case, Mining Co. v. Tarbet, 98 U. S., 463."

In Del Monte M. & M. Co. v. Last Chance M. & M. Co., 171 U. S., 87, after a review of these cases this court says that they settle these propositions:

"That the end lines of the location as made by the locator, "are the only lines that will be recognized; that the courts "have no power to establish new lines or make a new loca- "tion."

The last case decided of which we have report touching the question of extralateral right is that of Walrath v. Champion Co., 171 U. S., 293, in which the court was called upon to construe a patent issued Apr. 28th, 1871, upon a location made under the law of 1866.

In this case the patented area of the Providence location presented a northerly end line having two planes, that is, a broken or elbowed line, thus, "f_____g_____h" f—g—g—h. The southerly end line was parallel to the line g—h, and hence not parallel with f—g. The Providence vein, upon which the location was made passed across the line g—h, and the "Contact" vein in dispute passed across the line f—g.

The question was which of these lines constituted the direction of the plane by which to control the right to follow the "Contact" vein on the dip.

The court, speaking by Mr. Justice McKenna, says:

"The extent of the right passing under the act of 1866 has "been decided by this court", and proceeds to quote in support of the statement, the doctrines of the Flagstaff case as hereinabove given, and adds:

"And after stating that the act of 1872 was more explicit "than the act of 1866, but the intent of both undoubtedly the "same, as it respects lines and side lines, and the right to "follow the dip outside of the latter, he" (Mr. Justice Bradley) "proceeded as follows:"

Here the court quotes at length from the Flagstaff opinion, and then says:

"This law was followed and applied in Argentine Mining "Company v. Terrible Mining Company, 122 U. S., 478; and "in Iron Silver Mining Company v. Elgin Min. & S. Co., 118 U. "S., 196; King v. Amy & Silversmith Consol. Min. Co., 152 "U. S., 222.

"The locations passed upon in these cases were made under "the act of 1872, but we have seen that the intent of that act "and the act of 1886, 'as it respects end lines and side lines' "was the same."

The court then proceeds to quote approvingly from the opinion in the Del Monte case, as follows:

"First, the location as made on the surface by the locator "determines the extent of rights below the surface."

The seventh and last contention of defendant in error is that:

"The Kennedy Mining and Milling Company, by reason of "its acts and conduct, and that of its predecessors in title, "are estopped from asserting that the Argonaut Mining Com-"pany has no extralateral right in the vein in dispute."

This evidently relates to the agreement made between the *grantor* of plaintiff in error, *as to the Kennedy mine* and the *grantor* of defendant in error as to the *Pioneer mine*, under which a surface boundary between the two was agreed upon in the land office, as to which agreement plaintiff in error *was not a party*, and as to the existence of which *plaintiff in error took without notice*, and which in no way *concerns the Silva mine.*

Record, pages 15, 16 and 57.

The objections of plaintiff in error to the consideration of such agreement in the trial court were sustained, and so such agreement was "cut out of the case."

Record, page 55 and page 57, Fol. 113.

The effect of the rule adopted by the Superior Court and affirmed by the Supreme Court of California in the case at bar, was well illustrated by the leading counsel for defendant in error, in the brief filed by him in this court in opposition to the issuance of a writ of *certiorari* in the case of Walrath v. Champion (171 U. S., 293).

Counsel used the following language on page 22 of his brief, "Figure 6," referred to by him, being the same as "Diagram D'," found on page 72 hereof.

"In Figure 6 (see page —), we have the Providence location "A with the contact ledge $X^1$—$X^2$ crossing the line f—e at "an assumed point X, and extending on its course through an "assumed location D.

"There was some evidence introduced at the trial tending "to show that the ledge passes out of the line f—e approxi- "mately at the point X. But we are now dealing with this as "an hypothesis.

"The location 'D' is under the Act of 1872, and, of course, "junior in point of time to 'A.' D is a regular valid location, "covering 1,500 feet of the apex of the ledge X—$X^1$—$X^2$. "The end lines are parallel to each other and crosswise of the "lode.

"If the petitioner's theory is correct, that his northerly "bounding plane is to be drawn through f—g—g', it follows "as a corollary that the same rule is to be applied to the "crossing on the line f—e at X. He will, therefore, have all "the segment of the contact ledge lying between vertical "planes drawn through the lines f—g—g' and f—e—k—e', "and those lines produced indefinitely.

"Say the length of the ledge X—$X^1$—$X^2$ within the surface "lines of his location f—g and f—e is 700 feet, the dip being "in the direction of the arrows. Petitioner follows the ledge "on its downward course between vertical planes drawn as "above stated.

"When he reaches 2,000 feet in depth on the downward "course of the vein, he has *five thousand linear* feet of the ledge

# Diagram D¹.

"between the points g′ and e′ with a surface *apex* of only 700 "feet. 'D,' who has a regular valid location, with 1,500 feet "of the apex, could on plaintiff's theory take nothing below "the plane drawn through e—k—e′.

"Can petitioner seriously contend that Congress intended to grant him any such extraordinary rights?

"No locator under the Act of 1872 could acquire any such "privilege. Can it be said that that Act gave to the petitioner "on the contact ledge a greater right and a larger privilege "than it was *possible* to obtain with a similar form of location "made under the Act itself?"

The "contact ledge" referred to was not the *original* Providence vein, but was one of the "*other veins*" having their apices within the vertical boundaries of the Providence Mine, title to which "other veins" was acquired by the owners of the Providence by virtue of Section 3 of the Act of 1872. (Sec. 2322, R. S. of U. S.)

It would seem that this court was much impressed by the foregoing illustration: for, on finally deciding the merits of the case on appeal, Walrath v. Champion, 171 U. S., 293, the court itself sets up a most potent argument, apparently based on the Lindley illustration, to show why the rule of parallelism declared by the statute of 1872 applies not only to locations and patents under the law of 1872, but to those under the law of 1866 as well.

The court say:

"It may be true that under the Act of 1866 the patenting "of the Providence Mine in its irregular shape was in all "respects legal and proper, and that the Act did not require "the location to be made in the form of a parallelogram or in "any particular form, and that there was no requirement that "the end lines should be parallel. *It is also true that under that "Act only one vein could be included in a location, no matter how "much surface ground was included in the patent, but that under the "Act of 1872 possession and enjoyment of all the surface included "within the lines of their location and of all veins, lodes and ledges "throughout the entire depth, the top or apex of which lies inside of "such surface lines extended downward vertically, were given.*

"But rights on the strike and on the dip of the original vein, "and rights on the strike and on the dip of the other veins, we "have decided, are determined by the end lines of the loca-"tion."

Counsel on both sides in that case, each from his own standpoint, having "conceded" in argument that as to locations and patents under the Act of 1866 the end lines of the surface locations need not be parallel, the court, by the foregoing language conceding argumentatively that such *might* be the case, proceeds to call attention to the fact that by means of such locations title to only a single vein could be obtained; and that, if the rule of nonparallelism should be invoked as to such single vein, it must be borne in mind that the Act of 1872 confers title to all other veins whose apices are within such locations, so that, *as all the lodes within a location must be bounded by the same end lines*, the rule of nonparallelism would have to be applied, with the result shown by the illustration, to a set of lodes the title to which was conferred by a statute the cardinal principle of which is parallelism.

The language of the court implies that no such extraordinary privilege can be conceded as to such "other veins" within old locations; and if not, then, since all the lodes within a location must be bounded by the same end line planes, it is clear that the *original* vein must be bounded by parallel planes, so as to be included within the same planes bounding the "*other veins*", which planes, for the reasons shown, must be parallel.

---

## CONCLUSIONS.

From the foregoing principles, we deduce the conclusions:

1. The ownership as to *length upon the course or strike* of a vein, both on the surface and beneath the surface is limited by the *surface lines* of the location.

2. That the "outside parts" of such vein beneath the surface to which the extralateral right attaches cannot *exceed such length so fixed by the surface lines.*

3. That the *end line planes*, to justify a claim of extralateral right *must not be divergent* in the direction of the dip of the vein.

4. That where the end line planes are *divergent in the direction* of the dip of the vein, *no extralateral right exists.*

Plaintiff in error respectfully insists that the judgment of the Supreme Court of the State of California ought to be re-

versed, with directions to such court to order the Superior Court of the County of Calaveras to render judgment upon the merits in favor of plaintiff in error herein, the defendant in such state courts.

Respectfully submitted,

JOHN M. WRIGHT,

BYRON WATERS,

Attorneys for Plaintiff in Error.

JOHN GARBER,

Of Counsel.

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We attach hereto and file herewith the argument of Mr. John M. Wright in the trial court and respectfully ask that the same be considered in connection with this brief as part of our argument in this cause.

Respectfully submitted,

JOHN M. WRIGHT,

BYRON WATERS,

Attorneys for Plaintiff in Error.

JOHN GARBER,

Of Counsel.

KENNEDY v. ARGONAUT.

*In Supreme Court of the United States.*

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Here follows:

1. Index of Diagrams illustrating the Argument following.
2. The Argument of Mr. John M. Wright in the trial court, above referred to.
3. Transcript of Record in No. 1408 (this Cause), as used on said Argument.

# ARGONAUT v. KENNEDY.

*Hearing October 17, 18, 19, 20 and 21, 1898.*

INDEX OF DIAGRAMS ILLUSTRATING THE ARGUMENTS FOR DEFENDANT.

The paging refers to the within pages of the Argument of John M. Wright, where these Diagrams are used.

## FIRST SERIES.


| DIAGRAM. | PAGE. | |
|---|---|---|
| A | 220 | Shows segment paralleling south end line of Pioneer. |
| B | 221 | Shows segment paralleling north end line of Pioneer. |
| C | 222 | Shows segment with converging end lines, one paralleling the north end line and the other the south end line of the Pioneer. |
| D | 224 | Shows segment with end lines drawn so as to divide evenly the surplus angle of the Pioneer. |
| E | 235 | Shows segment with end lines drawn at right angles to the Pioneer Lode. |
| F | 230 | Shows segment with end lines drawn at right angles to south half of Kennedy Lode, the part south of the bend. |
| G | 231 | Shows segment with end lines drawn at right angles to north half of Kennedy Lode, the part north of the bend. |
| H | 232 | Shows segment with end lines drawn at right angles to line from south end center of Pioneer claim to bend in Kennedy Lode. |
| I | 233 | Shows segment with end lines drawn at right angles to line from center of north end of Kennedy claim to center of south end of Pioneer claim. |
| J | 101 | Shows Stone and Gilt Edge claims, illustrating the Elgin case, 118 U. S. 196. |
| K | 128 | Shows Mammoth claim, illustrating the Lakin cases, 53 Fed. 333; 54 Fed. 461; 154 U. S. (Mem. Dec.) |
| L | 112 | Shows Isosceles Triangle claim, illustrating case of Montana Co. v. Clark, 42 Fed. 626. |

| DIAGRAM. | PAGE. | |
|---|---|---|
| M | 228 | Shows ideal location, with end lines at right angles to the strike. |
| N | 228 | Shows ideal location, with end lines crossing the strike diagonally. |
| O | 58 | Illustrates the case of Kinney v. Cons. V. Co., 4 Sawy. 382. |
| P | 21 | Illustrates the Eureka case, 4 Sawy. 302. |
| Q | *Frontispiece.* | Minimized copy of the Large Map used at the Argument, with additional details. |
| R | 6 | Shows the elements of the Argonaut v. Kennedy case. |
| S | 16 | Shows Providence and New Years claims, illustrating the case of Walrath v. Providence, 63 Fed. 552; 72 Fed. 978; 171 U. S. —. |
| | | SECOND SERIES. |
| A' | 90 | Illustrates the Flagstaff v. Tarbet case, 98 U. S. 463. |
| B' | 142 | Illustrates the Cons. Wyoming v. Champion case, 63 Fed. 540. |
| C' | 226 | Shows the diverging end lines of Pioneer, and triangles a—b—c. |
| D' | 212 | Illustrates C. H. Lindley's divergent end line argument in the Providence case before U. S. Supreme Court. |
| E' | 94 | Shows triangle in conflict between Pioneer and Kennedy, if Eureka case rule were applied. |
| F' | 30 | Shows the Silva King claim and patent, illustrating the case of Doe v. Waterloo, 54 Fed. 935. |
| G' | 3 | Shows Amy and Non Consolidated claims, illustrating case of King v. Amy, 152 U. S. 222. |
| H' | 173 | Shows Del Monte, New York and Last Chance claims, illustrating Del Monte v. Last Chance case, 171 U. S. 55. |
| I' | 189 | Illustrates decision in North Star case, 73 Fed. 597; 83 Fed. 658. |
| J' | 76 | Shows segment with end lines at right angles to a line drawn from Kennedy North center to its South center. |



FOLD OUT IS TOO LARGE TO BE FILMED

# gram




South center.

IN THE

# Superior Court of the County of Calaveras

AND

## STATE OF CALIFORNIA.

ARGONAUT MINING COMPANY,
*Plaintiff,*
vs.
KENNEDY MINING AND MILLING COMPANY,
*Defendant.*

Two Actions, Nos 1408 and 1179.

## Argument of John M. Wright

FOR DEFENDANT UPON FINAL HEARING BEFORE

HON. G. W. NICOL, JUDGE

OF THE SUPERIOR COURT FOR TUOLUMNE COUNTY, CALIFORNIA, SITTING FOR THE COUNTY OF CALAVERAS, AT SAN FRANCISCO, OCTOBER 18, 19 AND 20, 1898.

[NOTE. The references are to the printed transcript in No. 1408. The record in No. 1179 was not printed.]

Tuesday, October 18, 1898.

### THE ELEMENTS OF THE DISPUTE.

*If your Honor please:*

To our thinking there is a vast mass of material in this agreed statement of facts, that does not belong there.

We think that this case when stripped down to its elements—to those portions which are material—is a very simple one.

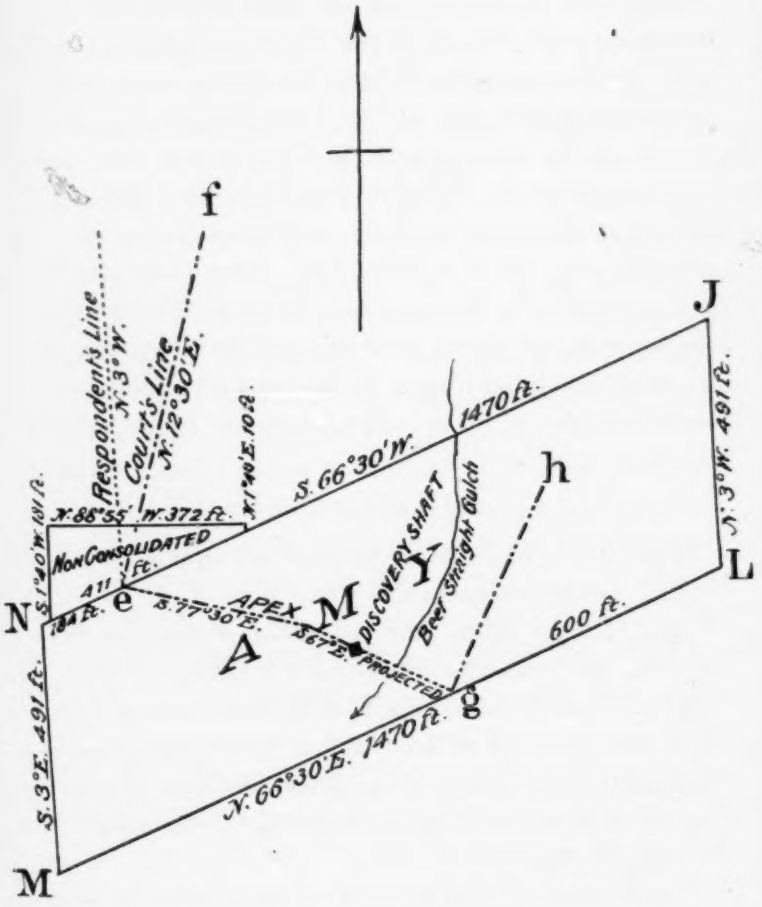
We say first that we are the owners of a mine down here (showing as on Diagram Q) which is called the Silva Mine; and that we have extracted certain ores from underneath the surface of this Silva Mine. We say that under the law as it has been frequently adjudicated, *prima facie* that ore belongs to us. The cases that I desire to call your Honor's attention to—and I will hand this little list of cases to your Honor upon the proposition—are to the effect that the owner of the surface owns all beneath except as against an owner following down on its dip underneath such surface, a vein having its apex within a properly located claim outside.

These cases are:

Cheesman v. Shreve, 37 Fed. 36;
Duggan v. Davey, 26 N. W. 887;
Doe v. Waterloo, 54 Fed. 935;
Cons. Wyoming v. Champion, 63 Fed. 540;
Iron Silver v. Elgin, 118 U. S. 98;
King v. Amy, 152 U. S. 222;
Argonaut Consol. M. & M. Co. v. Turner, 48 Pac. 685.

There is only one of these cases that I desire to refer to, as the law is so well settled and is admitted by counsel. It is the case of King v. Amy, 152 U. S. 419, represented by this little map (producing Diagram G[1]). Can your Honor see the outline?

# Diagram G¹


f
J
Respondent's Line
N. 3° W.
Court's Line
N. 12° 30' E.
N. 1° 40' E. 10 ft.
1470 ft.
S. 66° 30' W.
N. 3° W. 491 ft.
h
N. 88° 55' W. 372 ft.
S. 1° 40' W. 191 ft.
NON CONSOLIDATED
411 ft.
Y
L
N
e
184 ft.
S. 77° 30' E.
APEX
M
DISCOVERY SHAFT
Bear Straight Gulch
A
387 ft.
PROJECTED
600 ft.
g
S. 3° E. 491 ft.
N. 66° 30' E. 1470 ft.
M

THE COURT. Yes.

MR. WRIGHT. I desire to quote a few words from the decision in this case merely because of the peculiar language making the proposition so definite and certain.

The ores in dispute in this case were within this little triangular claim known as the Non-Consolidated (showing). The outside party claimed the ores by virtue of its ownership of this lode (showing Amy lode) extending across the side lines of this claim as located. The Supreme Court of the United States in deciding this case, decided as the first proposition, that, unless the owner of this (showing) the Amy claim had a right to go outside of this side line in this direction (showing) and take this ore (showing) on its dip from underneath the surface of the Non-Consolidated, then the ore became a part of the Non-Consolidated claim. The language is peculiarly strong:

"It became a part of that claim."

It is entirely unnecessary to waste the time of counsel and the Court talking on this point.

Next, having taken this ore from within our own ground, the plaintiff, who owns a claim at a distance known as the Pioneer, says that its vein extends down from this (showing as on Diagram Q) its apex, to and underneath the surface of the Silva, and that therefore the ore that we have taken out belongs to the owner of the Pioneer Mine.

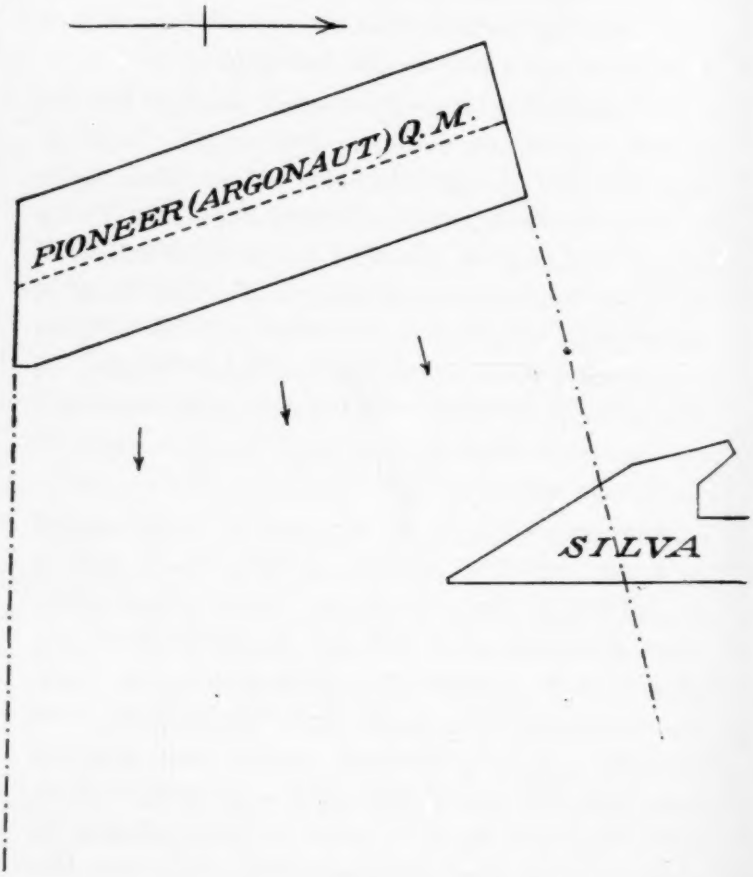
Now I submit to your Honor that that is all there is for the consideration of the Court in this case. It brings up

for discussion primarily the complaint; afterwards the principal proof by which that complaint is to be established, namely, the patent of the Pioneer Mine, our ownership of the Silva being admitted. Counsel admits that we have a right under the pleadings—under the general issue—to set up our title to the Silva as a defense to their claim to the ores which we have taken out.

Now counsel has referred somewhat jocularly but in a friendly way, to this little pamphlet of mine which he calls my "post-mortem argument." Your Honor has a copy and I would like to show a little diagram at the top of page 20 (hands the pamphlet to Court). I submit to the Court that, notwithstanding such a large mass of material has been brought into this case—for no good reason that I can see—that little diagram (Diagram R) contains all of the elements of this case of Argonaut Mining Company v. Kennedy Mining & Milling Company, as it now stands before the Court.

Before proceeding to the argument of what is necessarily the principal question in this case, I wish in my own way very briefly to review these objections, premising what will not be denied—what has already been asserted by counsel—that the plaintiff must necessarily stand upon the strength of its own title. And if it does not have the right to follow down that vein, and if that right is not sufficiently alleged, that is to say, if it is not definitely alleged, the plaintiff's case must necessarily fall. It is upon that proposition and for that reason that we have objected to

# Diagram R.



so much of this extraneous, this irrelevant and immaterial, matter in this case.

**The Plaintiff's Theory.**

I submit to the Court that counsel throughout this argument has presented this matter to the Court as though these two companies were partners from the beginning, away back in 1871 and 1872 when these patents were gotten out—as though they had been partners. The whole argument has been based upon that idea though without ever using the word; and that there was a dispute between them and that they finally agreed as to what share of the partnership property each should have. And counsel unkindly, as I think, has suggested that the Kennedy Mining and Milling Company, after taking its share, now wants to get a share of what belongs to the other side, as though the *Kennedy Mining & Milling Company* had agreed that such and such a portion of this lode might belong to the *Argonaut Mining Company* or to its predecessor in interest. I say that that is an element foreign to this case. If the Kennedy Mining & Milling Company has had the good fortune to own a rich mine and has or has not followed down a great lode to great depths within the earth, taking out rich ores and making its stockholders rich, is that any reason why the Kennedy Mining & Milling Company should not have any other ores to which it is entitled? Does that estop the Kennedy Mining & Milling Company from obtaining other titles, either in the Jackson Mining District or elsewhere?

If the Pioneer Company first, and the Argonaut Company afterwards, has failed to secure title to those ores, as we claim, has the Kennedy Mining & Milling Company no right to those ores simply because it is a rich company, because it has been fortunate enough to get money out from underneath the surface by following down its own ledge?

I submit that this is the gist of the argument upon which counsel bases his claim for retaining all this mass of material in this case. And I submit further that, notwithstanding the extreme courtesy of counsel on the other side, he has unnecessarily gone out of the record in trying to bring in ethical questions, as he termed them in fine phrase.

It is a question of right; it is a question of law. The Kennedy Mining and Milling Company wants this ground and the ores underlying it, and wishes to retain the money that it has taken out of that ground, if it belongs to it. And if it does not belong to it in the judgment of the Courts of this country, it does not want a cent of it.

## The Pleadings.

Now, perhaps it is desirable for me to present our views of these pleadings, very briefly. As Judge Lindley has stated their substance quite fully and fairly, it will not be necessary for me to go over them in detail. Of course we admit that the Argonaut Mining Company is a corporation, and that the Kennedy Mining Company is a corporation.

We admit in our answer the allegation in the plaintiff's complaint that the plaintiff owns the segment of land known as Lot No. 48, indicated by the pink shading on the plaintiff's map (showing as on Diagram Q). It owns that particular segment of land and we admit that it owns that segment of land exactly as it is described.

Immediately after having alleged its ownership of this segment of land, the plaintiff then proceeds to allege its ownership of the extra-lateral right, and says:

(Reading) "And plaintiff avers that at all of said times "it was and now is the owner, in the possession of and en- "titled to the exclusive possession of 1589 $^{94}/_{100}$ linear "feet of that certain quartz vein or lode known as the "Pioneer Quartz Vein or lode, which has its apex within "the premises hereinbefore described, with the exclusive "right to said 1589 $^{94}/_{100}$ feet of said lode throughout its "entire depth, although it may enter the land adjoining."

There is another allegation, a further allegation, as to the ownership of other veins; but we are not concerned with that, because, according to the stipulation, the ores in dispute were taken out of the Pioneer vein.

I will touch upon this subject further when I come to consider the last of the objections; but I wish at this time to call the Court's special attention to the condition of this allegation. The plaintiff avers that it is entitled to the exclusive possession of 1589 $^{94}/_{100}$ linear feet of a certain quartz vein; but I submit to the Court that neither in this paragraph of the complaint nor any where else in the complaint, has the plaintiff defined the particular segment of 1589 $^{94}/_{100}$ linear feet of the vein that is claimed.

I submit further to the Court that the plaintiff has nowhere alleged the claim it now makes before this Court to the ownership of a segment of the vein, of that entire segment of the vein bounded on the north by the line A-B extended in the direction of $B^1$, and on the south by the south end line of the Pioneer Mine extended in its own direction easterly (showing as on Diagram Q).

That is the claim of plaintiff before the Court, but where is it alleged? Nowhere in this complaint. The plaintiff must necessarily stand upon his complaint. It was his province, if he chose, to come here and make this allegation. But we were never put upon notice that that was his claim, and only within the last half hour I have first learned definitely that that is the plaintiff's claim.

He has claimed 1589 $^{94}/_{100}$ feet of this lode (showing as on Diagram Q) throughout its entire depth, and no more. He has not even taken the trouble to show us where those 1589 feet of the vein are located. He has shown us the apex of his vein but no more, with end lines diverging in the direction of the dip. Now if a party comes into this Court and says he owns a certain thing, he must of necessity define that thing, so that there can be no reasonable doubt as to what it is that he claims. But I submit that the last hour of the argument of counsel clearly shows that he knows that he has not so defined the segment of the ore that he claims—that this Court does not know what particular segment of the ore he claims, either by reference to the complaint or without it. Nothing can stand in this case that is not included within these pleadings.

The complaint next alleges that we sunk a shaft. We do not deny that. We used that shaft as a mere conduit for the ores underneath. We might have sunk the shaft vertically down from the surface of the Silva ground. We did not do so; we went west of the Silva ground and started our shaft here (showing as on Diagram Q) at the point "X". We sunk it down in such a way as to reach these ores underneath the Silva ground. Was it necessary in order to show that we had sunk this shaft—whether within ground that we own or within ground that we don't own—was it necessary to allege all these matters of title to what the Kennedy Mining & Milling Company owned? Not at all!

This shaft is a mere conduit for the ores. The question of the title of the Kennedy Mining & Milling Company has nothing whatever to do with this shaft. It was simply a means by which we got under the ground.

In passing through these pleadings, I may call the Court's attention to the method by which the plaintiff has alleged its ownership of the segment of ground known as Lot No. 48. Counsel says he knows of no decision showing that the beginning point has anything to do with the question of title, or words to that effect. I shall not at this time submit authorities upon that point, but I call the Court's attention to the fact that, although the plaintiff might have begun at any corner he chose and with any line he chose in defining his ownership, he has chosen as the base line of his title the south end of the Pioneer Mine, and that all the lines of his title are deduced from that base line.

It is true that his description was derived from the patent itself, but if he chose or if it was his intention, not to stand upon that particular line as the base line of his title, he had the option to otherwise describe that particular segment of ground. He did not do so but followed the patent in establishing that as his base line.

The answer admits that as the established base line of the property, and I take it as an established fact in this case for whatever it may or may not be worth.

## Review of Defendant's Objections to Certain of the Stipulated Facts.

At this time it is logical and proper for us to take up our objections, and to base our argument upon those objections which will bring up the questions we desire to present to the Court.

Our first objection is to paragraph IV, which shows the corporate capacity of the Kennedy Mining Company.

We object to that principally because it is irrelevant and immaterial, but because it is irrelevant and immaterial, we care nothing about it one way or the other except that it lumbers the record.

As I stated before, the title under which we claim is our title to the Silva Mine, and the corporate capacity of the Kennedy Mining Company has nothing to do with this case. The same may be said about the action of the Kennedy Mining Company in making an application for a patent to the Kennedy Mine, Lot No. 44. It has nothing to do with this case. Our ownership of the Kennedy Mine

has nothing to do with the case. The contest is between the Pioneer and the Silva.

The third objection on page 67 brings up this question of the surface conflict.

THE COURT. Where is that, Mr. Wright?

MR. WRIGHT. Page 67, followed on page 68. There was a surface conflict between the Kennedy Mining Company and the Pioneer Mining Company. If your Honor please, this conflict covered the land between perhaps about this point (referring to the map) and about this point (referring to the map). The Kennedy Company, in other words, claimed the right to come down to this distance (showing on the map) and the Pioneer Company claimed the right to go northward to this distance (referring to the map); and therefore the Pioneer Company adversed the proceedings of the Kennedy Mining Company in the Land Office.

**The So-Called Compromise Agreement.**

The fourth objection goes to the introduction of this agreement in writing, which is found in Finding VIII on page 25. I will read this:

(Reading) "In the matter of the applications respec-
"tively of the Pioneer Gold & Silver Mining Company
"and the Kennedy Mining Company for patents to Quartz
"Mining claims.

"Whereas, the above named corporations have respec-
"tively filed applications in the United States Land Office
"at Sacramento, for patents to quartz mining claims in
"Amador County, California, from which it appears that
"there is a conflict of claim to a portion thereof;

"And, whereas, the said corporations have mutually "adjusted, settled, and compromised such conflicts of "claims;

"Now, therefore, in consideration thereof, these pres- "ents witnesseth, that the Pioneer Gold & Silver Mining "Company withdraws from its application as aforesaid "any claim to the northern portion of the quartz lode or "lead and surface ground therein described and embrac- "ing forty feet and six inches, to-wit:"—

It is this segment of ground that the Pioneer Company withdrew from, 40 feet and 6 inches to the south (counsel refers to map and thereupon continues reading):

"Beginning at the Live Oak Tree, the point of com- "mencement mentioned in said application, and extend- "ing thence south the aforesaid 40 feet and 6 inches. "And the Kennedy Company abandons all claim to any "portion of the said quartz lode or lead and surface "ground, south of the point where such extent of 40 feet "and 6 inches shall terminate.

"And the dividing line between the claims of the "respective companies shall be one drawn at right "angles with the general course of the lode or lead, and "surface ground thereto appurtenant, and at the point "hereinbefore designated, to wit, where such extent of "40 feet and 6 inches shall terminate."

Now the language of this "compromise agreement," as it is called, is that the Kennedy Company "*abandons* all "claim to any portion of the said quartz lode or lead and "surface ground south of the point where such extent of "40 feet and 6 inches shall terminate."

This compromise has been brought into this case as though it were necessarily a muniment of title; as though this act of abandonment on the part of the Kennedy Min-

ing Company was an act of the paramount owner of the land, whereas it was nothing but an abandonment of whatever claim it had.

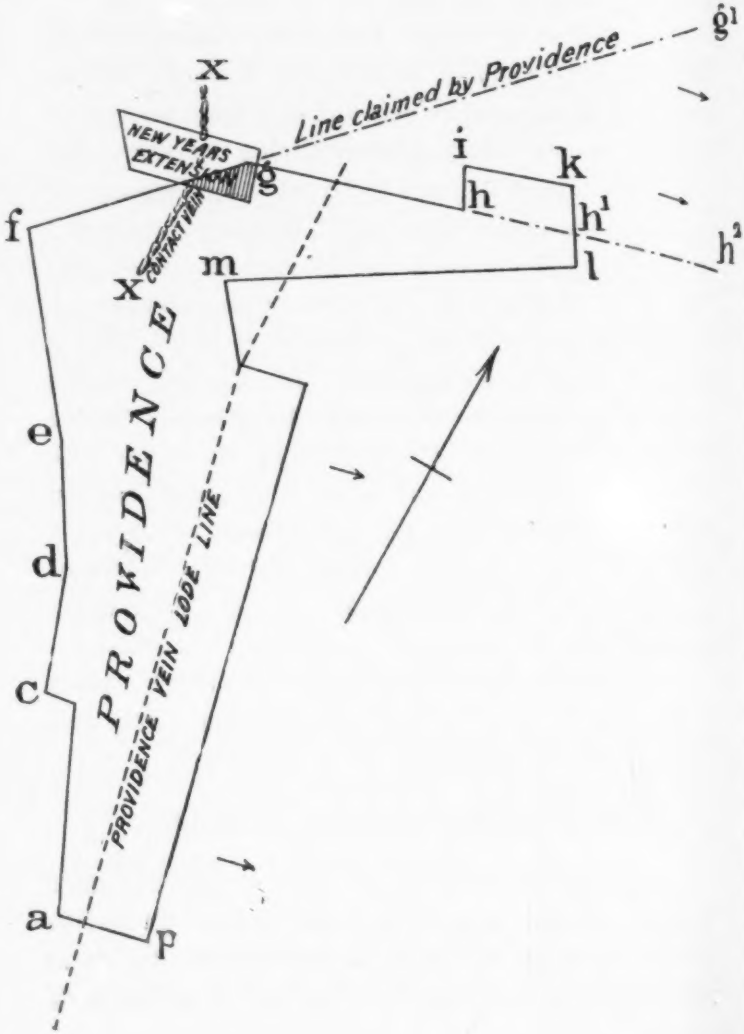
Abandonment to whom? Not to the Pioneer Gold & Silver Mining Company, because the Kennedy Mining Company did not own the land and so it could not convey it to the Pioneer Gold and Silver Mining Company. All it could do was to do just exactly what the language of the compromise agreement said. It could "abandon" the land and it did so to the government necessarily, leaving the Pioneer Gold and Silver Mining Company to deal individually with the government as to that part of the land which was abandoned. The Kennedy Mining Company did not concern itself, the Kennedy Mining Company, I say, did not concern itself afterwards with what the Pioneer Gold and Silver Mining Company did in its transactions with the government. That was a matter between the government and that company. After it had abandoned the land, it was no concern of the Kennedy Mining Company.

Now the Courts have dealt to some extent with matters of this sort. I think we have sufficient light on the subject to enable us to reach a correct conclusion.

**The Providence—Champion Compromise.**

During the progress of the proceedings of the Champion Mining Company in its application for a patent for the New Years Extension Mine, we find a state of facts as shown on this little map (showing as on Diagram S).

# Diagram S.


x
Line claimed by Providence
g¹
NEW YEARS EXTENSION
g
i
k
h
h¹
h²
l
f
x
CONTACT VEIN
m
PROVIDENCE
PROVIDENCE VEIN LODE LINE
e
d
c
a
p

There was a conflict between the New Years Extension, a conflict of location, between this New Years Extension and the Providence Mine. The Providence was already a patented mine. Eventually, a line was agreed upon between the parties and it was this diagonal line (referring to line f—g on map).

MR. LINDLEY. I don't know that it was at all material that there was an agreement, because there was an amended location filed.

MR. WRIGHT. I will get to that later. (Referring to line f—g on map.) Here is the line that was agreed upon. The matter was settled by an abandonment upon the part of the Champion Mining Company, the company owning on the north, just as in the case at bar; and the Providence Mining Company here (showing on the map) on the south, has from that time forward and until the recent decision of that case, the Providence case, by the Supreme Court of the United States, claimed that this line that I indicated a moment ago and now with my finger again, was the line that bounded the rights of the parties, not only as to the surface of the ground but as to the lode. Can your Honor see the map distinctly?

THE COURT. Yes, I can see the lines.

MR. WRIGHT. In the back end of my "post-mortem argument," as Judge Lindley terms it, there is a sketch of it; but perhaps Judge Lindley's little map illustrates it better.

MR. LINDLEY. That is Judge Hawley's map; it is not my map; it is found in Judge Hawley's opinion.

MR. WRIGHT. It is your map all the same. As I said a moment ago, in that case, as in the case at bar, the Providence Company claimed title to this triangular piece of ground, to the triangular piece of ground lying between this line and this line (showing lines g—$g^1$ and g—$h^2$ on the map)—the lode on its dip extending in this direction (showing as in the direction of the arrows on Diagram 8)—and all that portion of the lode lying between those two lines, by virtue of this abandonment.

Now let us see what the several courts did with this question.

In Walrath v. Champion Mining Company, 63 Fed. 552, 558, Judge Hawley says:

"The abandonment, which is binding upon it,"—that is, upon the Champion Company—"was to any and all lodes "within the surface boundaries of the Providence loca- "tion and survey; but this abandonment or agreement "or whatever it may be called, did not give to the Provi- "dence any greater rights than it previously had. The "acquiescence and agreement between the parties "amounted to nothing more than a recognition of both "parties that the line f—g was the boundary line be- "tween the two companies."

This was affirmed in Walrath v. Champion Mining Company, 72 Fed. 978.

In Walrath v. Champion Mining Company, 171 U. S., (the page I don't know)—I handed the decision to your Honor yesterday—it is said concerning the same matter:

"In the notice of re-location, however, the northerly "line of the Providence is called the south end line of "the re-located ground. The description is as follows:"

(Here follows the description.) "It is hence contended "that if the f—g is the southerly end line of the New "Years Extension it must necessarily be the northern "end line of the Providence Mine. This does not follow "nor is there any concession of it."

Here is exactly the same claim that is made in the case at bar. This line is the south end line of the Kennedy Mine (referring to map) as we admit, and it is contended that therefore it is the northern end line of the Pioneer Mine throughout the entire extension of this line.

The Court says: "This does not follow, nor is there "any concession of it. Coincidence of lines between "claims does not make them side lines or end lines. "Whether they shall be so regarded depends upon the "legal considerations which we have already sufficiently "entered into and need not repeat."

In other words, the Court means that each of these patents stands alone; it is a separate and distinct title in itself. It is a separate grant from the government, and it must stand or fall alone. The mere fortuitous fact that the north end line of the Pioneer is coincident physically, not legally, with the south end line of the Kennedy Mine to that extent, to the extent of its length, in no sense makes the titles the same. In other words, there is no partnership between these companies, and there never was.

The Court then proceeds to say, however: "We do not "say that there may not be an agreement settling end "lines. One example of such an agreement was exhibited "in Richmond Mining Company v. Eureka Mining Com- "pany, 103 U. S. 839."

And now we come to the famous Eureka compromise line.

(*At this point a recess was taken until 2 o'clock P. M. of the same day, when Mr. Wright resumed his argument as follows:*)

**The Eureka—Champion Compromise Line.**

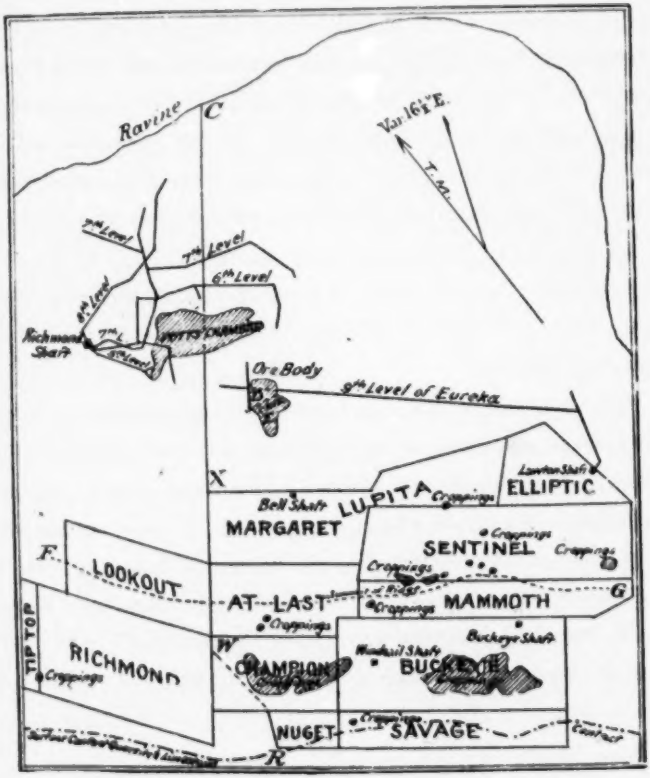
If your Honor please, we too have had made a map of the Eureka claims. The map is taken from the exhibit printed with the case in the 4th Sawyer and with all the reports of the case, and the directions are exactly opposite to what they are in the map that hangs behind us here, used by Mr. Lindley. (Exhibits Diagram P.)

MR. LINDLEY. The map is turned around, that is all; I turned the map around simply to show—

MR. WRIGHT. (Interrupting) If your Honor please, I have had colored in pink, blue and yellow the patents which formed the basis of the discussion by the Courts in this case, that is, the Circuit Court and the United States Supreme Court. The Champion, the At Last and the Margaret or Lupita belonged to the Eureka Company (referring to map). The Richmond and the Lookout are about the only ones particularly referred to in the decision, belonging to the Richmond Company. The compromise line was from "W" at this point (referring to the map) to this point "C" (referring to the map).

Now, in the Eureka case, as shown by both the decision in the Circuit Court, 4th Sawy. 302, 326, and the

# Diagram P.


Ravine
C
Var 16½° E.
T. M.
7th Level
7th Level
6th Level
6th Level
Richmond Shaft
7th L
6th Level
Ore Body
9th Level of Eureka
X
Bell Shaft
LUPITA
Croppings
Lawton Shaft
ELLIPTIC
MARGARET
Croppings
SENTINEL
Croppings
Croppings
F
LOOKOUT
AT LAST
Croppings
MAMMOTH
G
TIP TOP
RICHMOND
Croppings
W
CHAMPION
Windmill Shaft
BUCKEYE
Buckeye Shaft
NUGET
Croppings
SAVAGE
R

decision in the Supreme Court of the United States, 103 U. S. 839, when the Eureka and Richmond Companies entered into their compromise agreement, they actually owned the property they undertook to divide.

The compromise appears to have been based upon the ownership—I submit this case to your Honor's closest analysis for this conclusion—that the compromise appears to have been based upon the ownership of the Champion claim by the Eureka company and of the Richmond claim by the Richmond company. And in passing, I may say to your Honor that for all the purposes of the Eureka case, the entire case could have been and substantially was decided upon the ownership by the Eureka company of the Champion claim alone.

I submit this confidently to your Honor and ask that your Honor analyze the case with the closest attention you can give to it.

This entire case, both as to the end line question and as to the compromise line, was substantially decided in both courts upon the ownership by the Eureka company of the Champion claim alone, a claim which, as shown upon this little plat (showing) had parallel end lines, and about the ownership of which there could be no dispute. There never was any question as to the ownership of the surface nor of the minerals underlying the surface, nor as to the extra-lateral right.

Now in 4th Sawyer, page 326, it is said:

"As the Richmond and the Champion were vein or lode "claims"—I know the popular idea of this case is, if

your Honor please, that the compromise line was drawn, or, rather, approved by the Court, between a large number of these claims, but we must look to the decision itself and the decision says:

"As the Richmond and the Champion were vein or lode "claims, a line dividing them must be extended along the "dip of the vein or lode, so far as that goes, or it will not "constitute a boundary between them."

And the Supreme Court say as to the same matter, in Richmond v. Eureka, 103 U. S. 839:

"The Eureka had already got its patent for the Cham- "pion claim, which must have been older than the Rich- "mond, for the Richmond location was bounded on the "Champion and by this patent was permitted to follow "throughout their entire depth all veins, lodes, ledges and "deposits, the tops or apexes of which came to the sur- "face within the lines of its survey."

Here, if your Honor please, is a clear exposition of the title of the Eureka company without reverting at all to any compromise or to the ownership of the At Last or to the ownership of the Margaret or Lupita; consequently, in a sense, every thing in this case as to the compromise line, and every thing as to the Margaret and as to these other titles, is *obiter dictum*. It follows as the night the day. This case is decided on the lines I have just read, inevitably. I will repeat the language, with your Honor's permission:

"The Eureka had already got its patent for the Cham- "pion claim, which must have been older than the Rich- "mond, for the Richmond location was bounded on the

"Champion, and by this patent" (the Champion) "was "permitted to follow throughout their entire depth all "veins, lodes, ledges and deposits, the tops or apexes of "which came to the surface within the lines of its sur- "vey."

Suppose the decision had stopped right there, would not the practical results to the parties in suit be exactly the same as followed? Would this great confusion that has followed from attempts to distort, to improperly explain, the Eureka case, would any of these things ever have followed? The case was decided before any of these much confused questions were reached.

I read further:

"It is evident, also, that the Richmond company was "seeking a similar patent for its Richmond claim, as by "the terms of the settlement the Eureka was to with- "draw its opposition, and in due time such a patent was "obtained."

Not as in the case at bar, if your Honor please, not a claim with diverging end lines, but the Richmond Company procured a patent to exactly what was contemplated when the compromise agreement was entered into. It procured a patent square up to the line, and between that line and a line parallel at the other end of the claim. It actually secured its patent and then the two companies owned, the one up to one side and the other up to the other side of this so-called compromise line.

(Reading from the Supreme Court decision) "The "Eureka Company also pushed forward its applications "for patents to its other claims and in the end got them

"all in the same form and with grants of the same privileges. In this way the companies secured from the United States the right to work the entire metal bearing rock from the quartzite to the shale between the end lines of their patented surveys, extended downwards and following the dip of the mineralized limestone zone. Their patents are all alike, and their rights under them the same, save only that the Eureka is confined in its operations to the south-easterly side and the Richmond to the north-westerly side of the agreed line."

In other words, the Eureka Company, by means of its patent to the Champion Mine, already had a complete title to the property awarded to it by the compromise, while the Richmond Company proceeded to patent the Richmond claim in such a way as to perfectly secure all the property awarded to it by means of the compromise. The compromise was upheld by both the Circuit Court and the Supreme Court on the ground that the owner of the apex owned the lode, and that, inasmuch as the apex was within the Champion and the Richmond mines, the titles to which were unquestioned, ownership of the apex enabled the two companies to divide the lode to its greatest depths.

As I said before, this would have been the case if there had been no compromise.

There can be no doubt, however, that a different decision would have been reached if either of the parties had abandoned, or in any other manner had failed to secure, any portion of the title awarded to it by the compromise agreement.

In such case, the doctrine of Walrath v. Champion,

which I have already quoted, would have applied, namely, that the abandonment of a claim of title by one party does not confer title upon the other.

**Defendant's Theory as to the Pioneer--Kennedy Compromise.**

In the case at bar each party abandoned its claim to a certain portion of the lode and adjacent surface ground in dispute, leaving the other free to secure title to the abandoned property by independent dealings with the government.

And defendant here claims that the predecessor in interest of the plaintiff company neglected to take the proper steps to secure the property thus abandoned by the defendant's predecessor in interest, thus leaving it open to a new location by any third party or by even the defendant's predecessor itself. That is to say, after the Pioneer Gold and Silver Mining Company had secured what it did by its patent, even the old Kennedy Mining Company could have located over here on the dip (referring to the map) and could have acquired a title to the dip and that without any breach of any contract between it and the Pioneer Gold and Silver Mining Company. And this for the reason that it would be strange indeed if the status of this great lode should be held perpetually suspended at the mere caprice, or mistake, if you please, of the plaintiff's predecessor, after the latter had failed to secure title to it when it had the opportunity.

And so, when the Silva ground was located by third

parties and afterwards sold and patented to the Kennedy Mining and Milling Company, the title thus subsequently acquired was good, not only against the government, but against all the world, including the plaintiff's predecessor in interest.

The same result could not be claimed in the Eureka case, because, as shown by the Supreme Court, both parties carried out their agreements and secured perfect titles to all the property it was intended by the compromise agreement they should respectively secure.

**The Del Monte—Last Chance Compromise.**

Now, if your Honor please, the rule for which we contend was followed in its entirety by Judge Hallett in Del Monte Min. & M. Co. v. New York & Last Chance Min. Co., 66 Fed. 213, where he says—I will hand this memorandum to your Honor. I wrote this out because it is such an important point and it has been so much talked about that I want to be perfectly certain of my language. I quote from the case:

"Some years back, and before patents were obtained, "these locations" (the Last Chance and New York) "were held by different owners, between whom a contro- "versy arose as to the ownership of the territory common "to both locations. Upon the application of the owners "of one of the claims for patent, the owners of the other "claim made adverse claim in the Land Office, pursuant "to the Act of Congress governing such matters."

Just as it is in this case at bar.

"Thereupon the controversy was renewed in court and "was there pending for a considerable time without "trial or judgment. The parties then came to an "agreement by which the New York location was "allowed to patent the greater part of the terri- "tory in dispute, as indicated on the diagram, and "the New York and Last Chance Mining Company, "respondent in this suit, was organized to represent the "parties respectively, and the ground in dispute was con- "veyed to respondent in settlement of the controversy. "A title so arising may, it is said, be referred to one or "the other or both of the contending locations, and "respondent may follow the end lines of one or the other "location in its election. This, however, cannot be ac- "cepted. As respondent's territory was patented under "the New York location, the lines of that location must "control all questions of ownership. *The controversy prior "to patent is of no weight whatever as to any right arising "under the patent for one claim or the other.*"

Permit me to repeat the last language: "THE CON- "TROVERSY PRIOR TO PATENT IS OF NO WEIGHT "WHATEVER AS TO ANY RIGHT ARISING UNDER "THE PATENT FOR ONE CLAIM OR THE OTHER." And that is precisely our contention here, that the patent must stand or fall by itself.

Now, it is true this rule was not directly mentioned by the United States Supreme Court in Del Monte Mining & Milling Company v. Last Chance Mining & Milling Company, 171 U. S. 55, but it was taken as a matter of course and acted on, the Court considering nothing but the patents in determining the rights of the parties.

Throughout that whole great case, occupying page after page of the reports, there is not one reference to any compromise line, nor to anything antecedent to the patents nor to anything whatever excepting the patents themselves.

**Ante-Patent Proceedings Cannot be Considered. The Doe—Waterloo Case.**

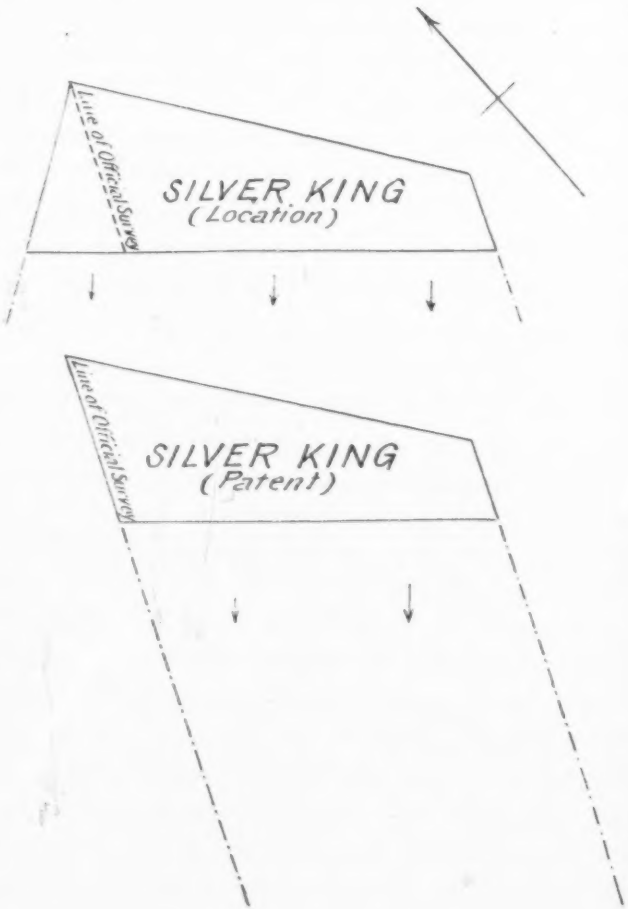
There is another important case which throws light upon this same question, and I have made some excerpts from it to apply on another branch of the case, but as they so well illustrate this point, I think I will read them here, and I may say that I read them also in response to a question asked by Judge Lindley this morning. I think the remark was in the form of a question as to what right or authority or power a mere surveyor could exercise in establishing the rights of a party under a patent to be obtained upon his survey. I answer him here and now. The surveyor has everything to do with it. *When the applicant adopts the survey and goes into the Land Office with it and becomes a party to it, the United States being the party on the other side, the law, if your Honor please, is that the surveyor is the agent of both parties, the claimant and the government,* and I shall show that in due time.

(Here counsel produces Diagram F[1]).

Now, if your Honor please, the diagram at the top represents the shape of the Silver King mine as it was located. This, I may say in passing, is one of the mines that was litigated in the great case of Doe v. Waterloo, first taken to the Supreme Court of the State of California under the name of Doe v. Sanger, and afterwards taken to the Circuit Court of the United States and carried up.

Now, this is the shape (referring to Diagram F[1]). The end lines diverge. The dip of the lode is in this direction

# Diagram F[1].


Line of Official Survey
SILVER KING
(Location)
Line of Official Survey
SILVER KING
(Patent)

(showing) downward. I think the distance between this point (showing) and this point (showing) is two hundred and fifty-nine feet. There was this considerable divergence between the end lines, and Mr. Dunlap, the surveyor, was requested to survey the claim for patent. In doing so, he drew the end line in, that is, this end line (showing on diagram) in order to make it parallel with the east end line, so that this line was a line that was made by the surveyor without either the direction or even the permission of any one. The owners of the property refused to accept the survey, and ignored the matter entirely. Later on they sold the property to other parties, who adopted the survey and proceeded to patent the claim.

In the United States Court, Judge Mesick and my associate Mr. Waters contended in that case that inasmuch as the end lines of the location—and we in the case at bar hear a great deal about location and very little about patents, as though the effect of the location were conclusive from its date—I say they contended that inasmuch as the location was made without parallel end lines, therefore no extra-lateral right attached.

Judge Ross handled the question, I think once and for all, and he says, in Doe v. Waterloo, 54 Fed. 935:

"In the original location of the Silver King, as has "been said, the end lines were not parallel, there being a "divergence of 259 feet at the south-west corner, in the "direction of the dip of the ore bodies; and, that being "the case, it is earnestly insisted on the part of the com- "plainant that the defendant has no right to follow any

" vein, lode or ledge having its apex within the surface
" lines of the Silver King, outside of the side lines of that
" claim extended vertically downward; that whether or
" not the extra-lateral right conferred by the statute
" exists depends entirely upon the fact whether or not
" the end lines as originally located were parallel, and
" that for that purpose regard cannot be had to the lines
" of the claim as patented by the government. The cases
" of Iron Silver Mining Company v. Elgin Mining &
" Smelting Company, 118 U. S. 196, and Mining Com-
" pany v. Tarbet, 98 U. S. 463, are relied upon as conclu-
" sively sustaining that position. Those cases undoubt-
" edly determine that a locator is bound by the lines of
" his surface location; and the former further determines
" that where, as in the present case, the location was
" made after the passage of the Act of May 10, 1872, it is
" 'essential to the existence of any right in the locator
" 'or patentee to follow his vein outside of vertical planes
" 'drawn through the side lines,' that the end lines of
" such surface locations be parallel. But by neither of
" those cases, nor by any other case that has been cited,
" has it been determined that, where the end lines of the
" surface location as fixed and declared in the govern-
" ment patent are parallel, the extra-lateral right given
" by the statute can be defeated by showing that accord-
" ing to the original location of the claim, such surface
" end lines were not parallel. If the rights conferred by
" the patent can be defeated by showing a want of par-
" allelism of the end lines in the original location, it is
" difficult to understand why the patent may not likewise
" be defeated by showing that the original location was
" void because its boundaries were not properly marked
" upon the ground, or because no vein, lode or ledge was
" discovered within them, or because the statutory re-
" quirement in respect to the posting of the notice of lo-
" cation was not complied with, or because of an omis-
" sion on the part of the locator to comply with any other
" provision of the statute regarding the location of such

"lode claims. All such matters I understand to be ab-
"solutely concluded by the patent so long as it stands
"unrevoked. If questions relating to the boundaries of
"the location, the marking of them, the discovery of a
"vein, lode or ledge within them, the posting of the re-
"quired notice, etc., are open to contestation after the
"issuance of a patent for the claim as before, the issu-
"ance of such an instrument would be a vain act and
"would wholly fail to secure the patentee the rights and
"privileges designed by the law authorizing its issue.
"The very purpose of the patent is to do away with the
"necessity of going back to the facts upon which it is
"based. Authorities to this effect in both federal and
"state courts are so numerous as to render it, I think,
"unnecessary to cite them.

"The patent in question was based, as has been said,
"upon a survey made in 1882 by United States deputy
"surveyor Dunlap, upon the request of Warden and his
"associates, and they rejected it because the draw-
"ing in of the southwest corner of the claim as originally
"located, in order to make the end lines parallel, left out
"of the claim a triangular piece of ground. But they sub-
"sequently in 1884 conveyed their interest in the
"entire claim to Bradley and his associates, and
"those purchasers adopted the survey as correctly
"representing the boundaries of the claim, and
"after causing the surveyor to again go over the
"boundaries and lines of his survey, made appli-
"cation to the government for the purchase and patent
"of the whole claim according to these monuments and
"boundaries; and it was upon such survey and applica-
"tion that their grantee, the defendant here, was per-
"mitted to enter the claim and upon which the patent
"was based. The lines of the claim as surveyed by the
"surveyor were plainly marked on the ground, and the
"monuments which marked them were thus adopted by
"the owners of the claim as correctly defining its
"boundaries. *No rights of third parties having inter-*
"*vened, it surely could not have been necessary for the*

*"owners to take down the monuments that marked the "lines and erect them over again. The drawing in of the "southwest corner of the original location in order to "make the end lines parallel, and which change was thus "adopted by defendant's grantors and by defendant, did "not take in any ground not included in the original loca- "tion. It did not take anything that belonged to any one "else; on the contrary it left out of the claim a triangular "piece of the ground. No good reason is perceived why "the lines of the claim could not be thus changed so as to "comply with the statute requiring the end lines to be "parallel, nor any reason for holding that a patent based "upon such a survey is not conclusive upon the government "as well as the patentee as to the boundaries of the claim; "and if conclusive upon the government so also upon any "of its grantees acquiring rights subsequent to those of "such patentee. * * * *"*

"Holding as I do that the patent is conclusive evidence "as to the true location of the Silver King claim, and as "the end lines of that claim as thus established are par- "allel, the right on the defendant's part to pursue any "vein, lode or ledge having its apex within those surface "lines in its downward dip outside of the side lines of "that claim extended vertically downward, and within "vertical planes drawn down through those patented "end lines continued in their own direction, follows "whether effect be given to the express grant of that "right contained in the patent or not; for the statute "itself gives it. Revised Statutes 2,322."

Now I have read this long quotation because it answers so many questions and supports so many propositions raised by our objections that it does away, perhaps, with the necessity for arguing each of these in detail.

**Review of Objections, Continued.**

If your Honor please, this question of the compromise line is brought up at a later stage in these objections.

When we come to take up the objections to the issuance of the patent to the Pioneer Company, the same argument applies there as applies here, where the matter refers to the patent of the Kennedy Mine.

When I come to that objection, probably I shall not repeat this argument, and perhaps I shall say nothing on that particular subject.

I think that what I have said and what I have quoted sustains the fifth objection, as to the direction given to William L. McKim to survey the Kennedy mine; also the sixth objection, as to the fact that he made a survey of the claim and that that survey was approved. I am now referring to the Kennedy Mine, Lot No. 44.

Now, these objections to these matters, and I may say to all matters referring to the Kennedy Mine, including the Kennedy patent, are made in good faith, because these matters are absolutely irrelevant and immaterial to any of the issues in this case, the elements of the dispute being the facts, as I stated at the outset, that we have gone under our own ground, the Silva ground, and taken out ore which plaintiff claims by reason of its claim of ownership of the dip right, and the third element being that we have sunk a shaft over here (referring to map). As I said in the beginning, it matters not whether it was made on our ground or on somebody else's ground; it was merely the means of reaching the ores in dispute.

It is hardly necessary to repeat the second reason for this objection after the authorities I have read.

(Reading from page 69 of the printed record in 1408):

"(*b*) All and singular each and every the facts so ob-
" jected to are incompetent as evidence to limit or enlarge
" or explain or anywise to control or modify or affect the
" terms or provisions or legal effect of the patent issued
" to said Kennedy Mining Company for said Kennedy
" Quartz Mine, Lot No. 44, on July 29, 1872, as shown by
" paragraph I of said agreed statement."

Then the next reason stated—we do not particularly rely upon it—is stated in the objection itself.

(Reading further from page 69 of the printed record in 1408):

"(*c*) All and singular each and every the facts so ob-
" jected to, relate only to the surface area to be embraced
" within said Kennedy Quartz Mine, Lot No. 44, and in
" nowise relate to any extra-lateral right claimed as
" attaching to said Kennedy Quartz Mine, Lot No. 44, nor
" to any right or interest in any part of any lode or lodes
" lying outside the vertical boundaries of said Lot No. 44."

Now, we say as to this, that the end lines themselves, as fixed by the patent, determine the extra-lateral right or the want of it. That is all that it is necessary to say upon that point. If they proceeded to patent with end lines that gave them no extra-lateral right, they did not get it by reason of the compromise, in any way, shape or manner. All we could do was to withdraw from the ground.

**The Defendant a Stranger to the Compromise.**

The next reason given is more important. This agreement, that is, such as it was, was made between a party a stranger to this suit, and the Pioneer Gold and Silver

Mining Company, the predecessor of the plaintiff in interest.

(Reads further, from pages 69 and 70 of printed record in 1408)

"(*d*) The agreement as to the common boundary line "between said Kennedy Quartz Mine and the Pioneer "Quartz Mine, set out in paragraph VIII of said agreed "statement, is not recited nor referred to in said patent "to said Kennedy Quartz Mine, nor was said agreement "ever recorded in the office of the County Recorder of the "County of Amador, State of California, in which said "Kennedy Quartz Mine is situate, nor is it alleged in the "complaint herein that this defendant was a party to "said agreement, nor that this defendant ever had any "notice or knowledge of the existence of the same at the "time it acquired its title to the Silva Quartz Mine, Lot "No. 86, the patenting of which is shown by the facts set "forth in paragraph XXVIII of said agreed statement."

I think there is "meat" in this objection, but I do not think it is necessary to argue it. It speaks for itself, and in fact, counsel upon the other side practically concedes the force of it as stated.

**Defendant does not Claim the Disputed Ores Under its Kennedy Mine Title.**

The next reason amounts to simply an allegation of our ownership of the ore by virtue of our ownership of the Silva Mine. Therefore, it is not necessary to repeat it, but we wish to say at this point, once and for all, a thing that has been stated throughout this entire case wherever the matter has come up. It is in the stipulation of facts as well

as in these objections, repeated many times, that this defendant does not, in any way or manner, claim any title to any of these ores, either to the ores that were taken out south of the Kennedy line extended and within the Silva ground or to the ores taken out of the Volunteer ground, by reason of its ownership of the Kennedy Mine. The Kennedy Company claims nothing by virtue of its ownership of the Kennedy Mine, Lot No. 44, south of the south end line of the Kennedy Mine extended in its own direction easterly, but in all the debates on this subject with counsel on the other side, I have been unable to disabuse his mind of the idea that we are in some way or manner claiming that.

I would like to have it settled that for no purpose whatever in this case, has it ever been claimed or is it now claimed or will it ever be claimed that we went into these disputed ore bodies by virtue of our ownership of the Kennedy Mine.

So far as these ores in suit in the first case, No. 1179, are concerned, at the time they were taken out, the property—this Volunteer Mine—(showing as on Diagram Q) was owned by a man named Meehan. When he sold the Volunteer Mine to the Argonaut Company, he did not, so far as the record discloses nor so far as I have any knowledge or belief on the subject, sell any right of action he might have claimed against the Kennedy Company for taking out this ore; and, therefore, so far as this ore is concerned, it is practically just the same as though it had been on government land—as though we had taken it out

under our right by virtue of the first section of the Act of May 10, 1872, which allows us to mine on any government land wherever we please, so long as we do not get into any body else's ground. Of course the same rule obtains there in 1179 as here in 1408, that the plaintiff, if it recover at all, must recover on the strength of its own title.

Now, we have a second set of objections, the first of which refers to the Kennedy patent. Objection 7 on page 71 (referring to the printed record in 1408) refers to the Kennedy patent, which is set forth in *haec verba* in the agreed statement of facts. We say that that is all irrelevant and utterly immaterial to the issues of this case. No matter what the Kennedy Company got or did not get in any way by its patent, the Argonaut Company does not claim what the Kennedy Company got by reason of its patent to Lot No. 44.

The next objection is merely as to the transfer of the rights obtained by the Kennedy Mining Company, to the Kennedy Mining and Milling Company. It is no concern of the Argonaut Company whether that was a transfer to us or not. It is immaterial to every issue in this case.

The gist of our objection appears in reasons "c" and "d" on page 72 (reading):

"(c) Plaintiff cannot establish a title in itself to the "ores in dispute in this cause by showing that the de- "fendant has no title nor right to said ores by reason of "its ownership of the Kennedy Quartz Mine, nor by "showing the limitations of the patent to said Kennedy "Quartz Mine, but plaintiff must rely upon and clearly "show its own title to said ores; and,

"(*d*) Defendant claims title to the ores in dispute in "this cause by reason of its ownership of said Silva "Quartz Mine, Lot No. 86, and not by reason of its owner- "ship of said Kennedy Quartz Mine, Lot No. 44."

All these things are irrelevant and immaterial and the same reasons exactly apply to the representations of the Kennedy Mine in the plat "Exhibit A" and to every reference to it upon this map. This map (referring to "Exhibit A" in printed record in 1408) should, in my opinion, be cut down so that there would be nothing on it except the Pioneer, the Silva and our shaft.

The same as to objection 10: "All and singular each "and every the facts set forth in paragraph XVIII of said "agreed statement, in so far as such facts show or tend "to show the southern end line of said Kennedy Quartz "Mine and the coincidence of the northern end line of "said Pioneer Quartz Mine with a part of the southern "end line of said Kennedy Quartz Mine."

This has all been sufficiently debated and has been all decided, as I think, by the remarks of Mr. Justice McKenna in the case of Walrath v. Champion, which I have already quoted.

Also it is entirely irrelevant and immaterial to every issue here as to whether or not the Kennedy Company has a vein in its mine, as found in paragraph XX of the agreed statement.

Objection XI goes to that point: "All and singular "each and every the facts set forth in paragraph XX of "said agreed statement, in so far as such facts show or "tend to show the existence of a ledge of rock in place

"bearing gold within said Kennedy Quartz Mine, Lot No. "44, and the nature and extent of said vein within said "Kennedy Quartz Mine."

That is all totally irrelevant and unnecessary here.

(Reading) "Twelfth. All and singular each and "every the facts set forth in paragraph XXI of said "agreed statement, in so far as such facts show or tend "to show the existence and course of a vein in said Ken- "nedy Quartz Mine, Lot No. 44, and that said vein crosses "out of said Kennedy Quartz Mine into said Pioneer "Quartz Mine."

The questions before this Court are: Is there a vein in the *Pioneer* Mine? How does it lie, within *that* mine? Does it come up to the end lines of the claim or does it come up to one end line and go out of one side line?

*These* are the matters to be determined, what sort of a vein there is within the *Pioneer* Mine and not what kind of a vein there is within the Kennedy Mine.

The same remarks apply to objections 12, 13 and 14 on pages 73 and 74. The matters therein referred to are simply irrelevant and immaterial and incompetent to prove anything in this case alleged, or denied or agreed upon.

The 15th objection on page 75 brings up these ante-patent proceedings of the Pioneer Company. I do not care to argue this in detail, as I think I have said sufficient on that subject.

The same as to the 16th objection.

The same as to the 17th objection, referring to the compromise agreement.

The same as to the 18th, referring to the directions given to the deputy surveyor to make a survey of the Pioneer.

The same as to the 19th, showing the return of the survey.

I think at a later period of this discussion I may refer to some extent to this matter. It is claimed by counsel upon the other side that these matters are relevant and perhaps, as a matter of safety, I ought to discuss them to some extent, but not at this time, because it will save time for me to present my views on this particular subject in connection with other matters.

The same remarks refer to the 20th objection on page 76. It has been fully discussed.

**Defendant Denies Plaintiff's Claim of an Extra-Lateral Right.**

We now come, if your Honor please, to the principal matter in this case, the Pioneer patent. Probably the time has now come when we should state to your Honor the reasons why we are confident that no extra-lateral right whatever attaches to this property, in order that there may be no mistake about our position in this case.

We say here that: while we admit the plaintiff's ownership of that entire segment known as Lot No. 48, that segment on the surface of the earth and extended down to the center of the earth, and to all the lodes within that segment, that is, between vertical planes drawn down through the boundaries of that segment; we have denied

in the pleadings and we deny here that under the law and the facts, under this patent, the plaintiff has any extra-lateral right whatever. And I may say further that we do not state this proposition tentatively and uncertainly, but, your Honor, we state it with the fullest confidence in its soundness, and in the full belief that your Honor will adopt our views as the law in this case. We are not entering upon an uncertain discussion.

**The Controlling Sections of the Statute.**

It is true, as stated by counsel on the other side, that an entry of Lot No. 48 was made and had in February, 1872; but it is also true that this claim was patented more than three months after the Act of 1872 was passed.

I will read first to your Honor, Section 3 of the Act of 1872, which has gone into the revised statutes as Section 2322.

This section says: (reading) "The locators of all min-
"ing locations heretofore made or which shall hereafter
"be made on any mineral vein, lode or ledge situated on
"the public domain, their heirs and assigns, where no
"adverse claim exists on the 10th day of May, 1872, so
"long as they comply with the laws of the United States
"and with State, territorial and local regulations not in
"conflict with the laws of the United States governing
"their possessory title, shall have the exclusive right of
"possession and enjoyment of all the surface included
"within the lines of their locations"—that we concede—
(continuing reading), "and of all veins, lodes, and ledges
"throughout their entire depth, the top or apex of which
"lies inside of such surface lines extended downward
"vertically, although such veins, lodes or ledges may so

"far depart from a perpendicular in their course down-
"ward as to extend outside the vertical side lines of such
"surface locations. But their right of possession to such
"outside parts of such veins or ledges shall be confined
"to such portions thereof as lie between vertical planes
"drawn downward as above described through the end
"lines of their locations, so continued in their own direc-
"tion that such planes will intersect such exterior parts
"of such veins or ledges. And nothing in this section
"shall authorize the locator or possessor of a vein or lode
"which extends in its downward course beyond the verti-
"cal lines of his claim to enter upon the surface of a claim
"owned or possessed by another."

Now, this section says: "The locators of all mining
"locations heretofore made or which shall hereafter be
"made on any mineral vein, lode or ledge situated on the
"public domain, their heirs and assigns, where no ad-
"verse claim exists on the 10th day of May, 1872, *so long as*
"*they comply with the laws of the United States*," shall have
extra-lateral rights.

This morning, I think it was, counsel advanced the proposition that this was intended to apply to ALL LOCATIONS THERETOFORE MADE. I ask your Honor, and I ask him, whether he could advance such a proposition seriously? Does that mean a location made without authority of law? It is impossible that that could have been intended by this statute. A location is no location unless it is made lawfully, and therefore we must look into the law as it was before this statute was enacted, to see whether the claim in dispute here was made according to law, and whether its owners have complied with the statutes of the United States within the meaning of this section of the law.

This section of the law is our text; it furnishes the basis of our inquiry.

Is this one of the locations intended when it says, "the "locators of all mining locations heretofore made"? And have its owners "complied with the laws of the United "States"? These are the two questions which must be answered in the affirmative. It must be shown, first, that it is a legal location; and, second, that its owners have complied with the laws of the United States.

Section 2 of the act of 1872, which has passed into the revised statutes as section 2320, says:

"Mining claims upon veins or lodes of quartz or other "rock in place bearing gold, silver, cinnabar, lead, tin, "copper, or other valuable deposits, heretofore located, "shall be governed as to length along the vein or lode by "the customs, regulations and laws in force at the date of "their location. A mining claim located after the 10th "day of May, 1872, whether located by one or more per- "sons, may equal, but shall not exceed, 1500 feet in "length along the vein or lode; but no location of a min- "ing claim shall be made until the discovery of the vein "or lode within the limits of the claim located."

There are two classes of claims referred to in the prior portion of this section that I have just read. (Continues reading)

"No claim shall extend more than three hundred feet on "each side of the middle of the vein at the surface, nor "shall any claim be limited by any mining regulation to "less than twenty five feet on each side of the middle of "the vein at the surface, except where adverse rights ex- "isting on the 10th day of May, 1872, render such limita-

" tion necessary. The end lines of each claim shall be " parallel to each other."

Now we have three questions interjected into this discussion applying to this particular claim. First, was this such a location as was intended by Section 3 of the Act of 1872? Second, have they complied with the law involved in that section? And the third question is the cardinal question here, namely, whether it was necessary that the end lines of their claim should be made parallel and if so whether they have made those end lines parallel.

## When a Patent May be Declared Void.

At this stage of the discussion, I think it is proper to state our views as to when a patent may be declared void, either in whole or in part.

Our position here necessarily involves the proposition that the statement of the extra-lateral right contained in the Pioneer patent is absolutely void, and this we claim. The Pioneer patent undertakes to convey 1589 $^{24}/_{100}$ linear feet of the Pioneer lode throughout their entire depth, without defining what particular segment of 1589 $^{24}/_{100}$ linear feet it was intended should be conveyed, unless such segment should be defined with reference to the south end line, the basic or initial boundary line. We don't think for a moment that they have any extra-lateral right defined with reference to any of these boundary lines. I merely refer to that as the only possible exception, their only possible chance.

Possibly, your Honor, it would be unnecessary to refer for this particular purpose to any case except the case known as the Elgin case found in 118 U. S., on page 196. There, as here, the patent recited the conveyance of an extra-lateral right. The recitation was as full and as complete as it is here. The objection was made in precisely the same way as it is made here. The parties owning the Stone claim undertook to go in under the ground of their opponents under claim of ownership of the dip of the Stone ledge. The testimony was objected to by the owners of the Gilt Edge claim, upon the ground that because of the surface form of the Stone claim, its owners had no right to pursue their lode outside of its surface lines extended vertically downward. That is precisely the legal position here. The owners of the Gilt Edge Mine claimed that the extra-lateral right recited in the patent to the Stone claim, was absolutely void, and the Court so held, so in that case we have an exact parallel.

MR. LINDLEY. Well, I beg your pardon for interrupting you. That case arose under the Act of 1872.

MR. WRIGHT. That is not the point I am getting at.

MR. LINDLEY. You say they are parallel.

MR. WRIGHT. If your Honor please, I am referring to the method by which such a matter as this is reached; it is merely a question of legal procedure.

MR. LINDLEY. I misunderstood you; I thought you said that the cases were exactly parallel.

MR. WRIGHT. I mean as to the procedure itself. And, as suggested by Mr. Waters, the parallelism is pursued in

respect of the fact that the extra-lateral right is actually named in the patent; so that, if the Land Office could have made conveyance of the extra-lateral right, it would have been good, just as here. If it had been within their power, it would have been a good conveyance.

I will hand your Honor this collection of authorities upon the questions as to when, where and under what circumstances a patent can be declared void, and as to the extent of the power of the Land Department of the United States to pass upon and decide jurisdictional facts.

These questions are discussed in this list of cases, which I will not recite.

(The following is a list of the cases referred to by counsel):

Rose v. Richmond, 17 Nev. 25;
Richmond v. Rose, 114 U. S. 576;
Whitney v. Taylor, 45 Fed. 616;
Francoeur v. Newhouse, 40 Fed. 623;
Polk's Lessee v. Wendal, 9 Cranch 87;
New Orleans v. U. S., 10 Pet. 662, 730;
Wilcox v. Jackson, 13 Pet. 498, 509;
Stoddard v. Chambers, 2 How. 284, 317;
Easton v. Salisbury, 21 How. 426, 428;
Reichert v. Felps, 6 Wall. 160;
Best v. Polk, 18 Wall. 112, 117;
Leavenworth L. & G. R. Co. v. U. S., 92 U. S. 733;
Newhall v. Sanger, 92 U. S. 761;
Sherman v. Buick, 93 U. S. 209;
Smelting Co. v. Kemp, 104 U. S. 636;

Steel v. Refining Co., 106 U. S. 447;
Railway Co. v. Dunmeyer, 113 U. S. 629, 642;
Reynolds v. Mg. Co., 116 U. S. 687;
Doolan v. Carr, 125 U. S. 624;
Railway Co. v. Whitney, 132 U. S. 357;
St. Paul Co. v. Northern Pac. Co., 139 U. S. 18;
Northern Pac. v. Cannon, 54 Fed. 252;
Lakin v. Dolly, 53 Fed. 333;
French v. Fyan, 93 U. S. 169;
Quinby v. Conlan, 104 U. S. 420;
Vance v. Burbank, 101 U. S. 514;
Gale v. Best, 78 Calif. 235;
Aurora Hill Con. Min. Co. v. '85 Min. Co., 34 Fed. 519.

I desire to read a few excerpts from these cases which will illustrate these points fully.

In Northern Pacific Railroad Company v. Cannon, 54 Fed. 252, the rule is stated as follows:

"The authorities upon this subject are to the effect "that, if the officers of the government *acted without* "*authority of law*, if the lands conveyed by the patent were "never within their control, or had been withdrawn from "their control, before the patent issued, then their acts "were void for want of power to issue the patent."

Now of course we do not dispute the right of the Land Department to make a conveyance of this as mineral land, nor was any such claim made in the Elgin case. The ownership of the segment of land bounded by the surface lines of the Stone claim, was never disputed, nor is the

same claim disputed here. The proposition is, that when an applicant goes into the Land Office and makes claim to a mine which is not properly shaped according to law, while it is true the Land Department may issue a patent to the land, it cannot grant the extra-lateral right in connection with that piece of land. The rule goes to this extent: Your Honor will remember in my reading from the case of Doe v. Waterloo, that Judge Ross there states that the extra-lateral right follows the grant of a properly located claim, whether it is mentioned in the patent or not. That is the substance of it. That position is conceded by Mr. Lindley; and that, if the land is not properly located, no recitation of the extra-lateral right in the patent can operate to make a grant, for the simple reason that the matter is beyond the power of the Land Department to make any such grant.

Now in the same case, N. P. Co. v. Cannon, it is further said:

"The Supreme Court of the State of Nevada, in Rose v. "Mining Company, 17 Nev. 25, held that a patent issued "for a lode or vein claim at a time of a pending contest "between the claimants in the State Court to determine "the right of possession to the identical lode for which "the patent was issued, was absolutely null and void, be- "cause it was issued without authority of law."

That was the entire patent. (Continues reading)

"This decision was affirmed in Mining Co. v. Rose, 114 "U.S.570. In Lakin v. Dolly, 53 Fed. Rep.333, the Circuit "Court for the Northern District of California decided that "a patent issued for a mining lode or vein for more than

"ent issued for a mining lóde or vein for more than "300 feet in width of surface ground, was null and void "as to the excess over 300 feet. Now, in these cases, "as well as those in relation to agricultural lands, the "fact was apparent by the provisions of the law that the "officers of the government had no authority to issue any "patent in the Richmond case, and no patent exceeding "300 feet of surface ground in width in the Lakin case."

This decision was by Judges Gilbert, Ross and Hawley.

I shall have occasion to refer to the case of Lakin v. Dolly again at a later stage of the discussion and on another branch of this case.

In Doolan v. Carr, 125 U. S. 624, the rule is fully stated as follows:

"There is no question as to the principle that where the "officers of the government have issued a patent in due "form of law which on its face is sufficient to convey the "title to the land described in it, such patent is to be "treated as valid in actions at law as distinguished from "suits in equity, *subject, however, at all times to the inquiry "whether such officers have the lawful authority to make a "conveyance of the title.* But if those officers acted with- "out authority, if the land which they purported to con- "vey had never been within their control or had been "withdrawn from that control at the time they under- "took to exercise such authority, then their act was "void—void for want of power in them to act on the sub- "ject-matter of the patent—not merely voidable—in "which latter case if the circumstances justified such a "decree, a direct proceeding with proper averments and "evidence would be required to establish that it was "voidable, and should therefore be avoided. The dis- "tinction is a manifest one, although the circumstances "that enter into it are not always easily defined. It is "nevertheless a clear distinction established by law, and

" it has been often asserted in this Court that *even a patent* " *from the government of the United States issued with all the* " *forms of law may be shown to be void by extrinsic evidence, if* " *it be such evidence as by its nature is capable of showing a* " *want of authority for its issue.*"

Now, that is well illustrated by this Providence map which we had here this morning, and which was taken down a little while ago. The patent undertook to convey 600 feet of the lode south of the segment of ground constituting the Providence Mine proper. The Courts have held—all the Courts, beginning with the Circuit Court and going up to and including the Supreme Court of the United States—that that conveyance of the outside 600 feet, was absolutely void. This of course is simply in line with the Flagstaff case, and all the cases of that class.

This fully illustrates the idea that extrinsic evidence is allowable in such a case to show how and why a patent should be declared void.

In Rose v. Richmond, 17 Nev. 25, 27 Pac. Rep. 1105,—I read from page 1113:

" The necessity of giving Courts of justice final juris-
" diction to review the action of the Land Department
" *even in cases where its officers have jurisdiction to act*, is
" very clearly and forcibly stated by the Supreme Court
" of the United States in Johnson v. Towsley, 13 Wall.
" 72, wherein it was decided that ' the Land Office, *deal-*
" *ing as it does with private rights of great value* in a man-
" ner particularly liable to be imposed upon by fraud,
" false swearing and mistakes, exemplifies the value
" and necessity of this jurisdiction.' But in this case
" the officers of the Land Department had no jurisdiction

"to determine the question at issue. At the time the St. "George patent was issued, there was a valid and pend- "ing contest in the Court to determine the right of pos- "session to the mining ground and lode in controversy, "and the Act of Congress expressly declares that in such "cases 'all proceedings * * * shall be stayed until "'the controversy shall have been settled or decided by "'a Court of competent jurisdiction, or the adverse "'claim waived.' The action of the Land Department "was in violation of this provision of the statute. The "government of the United States under the circum- "stances had no more authority than a mere stranger to "issue the patent. Its officers had no jurisdiction to per- "form any act, and it could not legally issue a patent "while a valid contest was pending in the state courts. "A patent issued without authority of law is void. U. S. "v. Chapman, 5 Sawy. 528; Polk's Lessee v. Wendal, 9 "Cranch 87; Stoddard v. Chambers, 2 How. 285; Mor- "ton v. Nebraska, 21 Wall. 660; Sherman v. Buick, 93 U. "S. 216. In Polk's Lessee v. Wendall, 9 Cranch. 99, the "facts show that the State of North Carolina attempted "to grant lands which she had no title or authority to "grant. The Court declared the patent void. Marshall, "C. J., in delivering the opinion, said: 'There are cases "'in which a grant is absolutely void—as where the "'state has no title to the thing granted, or where the "'officer had no authority to issue the grant. In such "'cases the validity of the grant is necessarily examin- "'able at law.' In Stoddard v. Chambers, 2 How. 318, "the facts showed that a patent had been issued at a "time when the lands therein granted were expressly re- "served from sale. McLean, J., in delivering the opinion "of the Court, said: 'No title can be held valid which "'has been acquired against law; and such is the char- "'acter of the defendant's title so far as it trenches upon "'the plaintiff's. * * * The issuing of a patent is a "'ministerial act which must be performed according to "'law. * * * It is true, a patent possesses the high- "'est verity. It cannot be contradicted or explained by

"'parol, but if it has been fraudulently obtained or issued
"'against law, it is void. It would be a most dangerous
"'principle to hold that a patent should carry the legal
"'title though obtained fraudulently or against law.
"' * * * The patent of the defendant having been
"'for land reserved from such appropriation is void.'
"From the views already expressed it is apparent, that
"the District Court was correct in its conclusions that
"the 'St. George patent was issued without authority of
"'law, while the land embraced in the application was
"'reserved from sale as effectually as though there had
"'been a special Act of Congress excluding it, and that
"'therefore it is absolutely void.'"

So the inquiry in all patent cases comes right down to this: Did the Land Department, under the law as it existed at the time of the issuance of the patent, have the authority to issue such a patent? The very latest mining case passed upon by the Supreme Court of the United States is that of Walrath v. Champion in 171 U. S., decided on May 23, 1898. There it is said:

"The patent in the Flagstaff case appears to have
"been the same as here, and besides, whatever the pat-
"ent here, it must be confined to the rights given by the
"statute which authorizes it."

And this is our rule of interpretation in this case. Whatever the rights are, they must be given by the statute which authorizes the patent.

In Davis v. Wiebbold, 139 U. S. 507, it is said:

"When the patent to the mining company was offered
"in evidence, an objection was taken on the ground that
"the exception contained in it excluded all town lots
"from the grant, and it was necessary for the plaintiff

"to show that the property in controversy did not con-
"sist of lots thus excepted. The exception in the patent
"went only to the exclusion of the lots from interfering
"with the surface of the land granted with the mining
"lode. *But we do not attach any importance to the exception,*
"*for the officers of the land department being merely agents of*
"*the government, have no authority to insert in a patent any*
"*other terms than those of conveyance, with recitals showing*
"*compliance with the conditions which the law prescribes.*
"*Could they insert clauses in patents at their own discretion*
"*they could limit or enlarge their effect without warrant of*
"*law. The patent of a mining claim carries with it such*
"*rights to the land which includes the claim as the law con-*
"*fers and no others, and these rights can neither be enlarged*
"*nor diminished by any reservations of the officers of the land*
"*department, resting for their fitness only upon the judgment*
"*of those officers.*"

Now, if your Honor please, I have presented these cases to show when and under what circumstances a patent may be declared void, because of the language of Judge Field in the Eureka case, quoted by Mr. Lindley yesterday. It has been quoted so often and the language is so sonorous, so high sounding, that it is calculated to deceive the human mind into thinking that there is something in the nature of a fetish, if you please, about a mere patent.

He says that a patent should be held "iron-clad "against all mere speculative inferences." This is true and we are not trying to dispute it here; but, as shown by the decisions and particularly by the case I first adverted to, that is, the Elgin case, wherever it is shown that the Land Department exceeds its jurisdiction and grants or undertakes to grant something it has no power

to grant, that attempt is absolutely void, and cannot be maintained in any Court either of law or of equity.

**Location with Diverging End Lines Never Legal.**

I said in substance a while ago that, in our opinion, before a location can be held to come under the provisions of section 3 of the act of 1872, it must be shown to be a location made under some law which theretofore existed. It must be a legal location. It becomes us then at this point of the inquiry, to go back and ascertain *whether there ever was a condition of affairs permitting the location of a claim with end lines diverging in the direction of the dip of the lode:* and I assert, without fear of successful contradiction from my very able opponent, that *there never has been a custom or a set of rules permitting it; that there never has been a law permitting it, and there never has been a custom which permitted it to be done.* It is a thing that has no sanction in the rules of miners; it never has had the sanction of any Court, either state or federal. It has not had the sanction of any law and it has not the sanction of any law to-day, and it has never had the sanction of any law or rule since the beginning of mining on the Pacific Coast. It has at all times been impossible that a lawful location could be made with end lines diverging in the direction of the dip of the lode. The statute means lawful locations, not locations made at the caprice or in pursuance of the greed of the locator.

**Location with Parallel End Lines Under Miners' Rules. The Comstock.**

(Counsel produces Diagram O) This diagram, if your Honor please, is copied from the 4th Sawyer. It is a sheet inserted between pages 402 and 403 in the case of Kinney v. Cons. Va. Mg. Co., which begins on page 382. I have had this plat copied for the purpose of showing clearly the custom of locating mines under the old rules of miners.

Now, these mines, as your Honor will recognize from the names, Mexican, Ophir, Central, California, Central No. 2, White & Murphy, Sides, Best & Belcher, Gould & Curry, are mines located on the Comstock Lode.

We have heard a great deal here in this discussion about the location of claims, and the location of end lines, and the location of claims along the lode, and the location of end lines at right angles to the course of the lode.

When the Comstock mines were located, a base line was agreed upon. This point here (referring to Diagram O) marked as "S. Ophir Stake" is the point from which all the Comstock surveys were measured. It may be called the datum point. This is the proper datum-line (showing Freeman's line on Diagram O) with reference to which all these claims were located, this black line. This red line (showing Mason's line on Diagram O) represents a line claimed as the datum-line by a man named Kinney. He claimed between this datum point (showing) and this point on the base line (showing south end

# Diagram O.


W.
Mason's or Complainant's Base and Course of Lode as claimed by Complainant
W. & M. SHAFT
KINNEYS & CENTRAL Nº 2 SHAFT
N. 10° E.
Freeman or Defendant's Base and Course of Comstock Lode as claimed by Defendant
N. 5° W.
S. OPHIR STAKE
210 ft.
933-7
215 ft.
500 ft.
50
100 ft
300 ft.
150 ft
200 ft
100 ft
S.
N.
1200 Level
KINNEY MASON BASE
CON. YA. SHAFT
0 Level
GOULD & CURRY
BEST & BELCHER
SIDES
WHITE & MURPHY
KINNEY, FREEMAN OR DEFENDANT'S BASE
CENTRAL Nº 2
CALIFORNIA
CENTRAL
OPHIR
MEXICAN
Course of end lines of all Claims except Kinneys, at right angles to Freeman's Base.
E.

of the datum-line) twenty feet more than any surveyor or any other claimant could find, and the Court explains the reason for that—this is a discussion by Judge Sawyer. The Court says that the reason Kinney found twenty feet more than any body else could find, was because he adopted as his base line a diagonal line or the hypothenuse of a right angled triangle, which is necessarily longer than its base. If this were the base of the location of these claims (showing), their end lines would all have to be drawn down at right angles to this red line (showing Mason's line) as the datum-line, and this line is necessarily as much as 20 feet longer than the actual datum-line agreed upon by all the other locators.

Now I refer to this claim of Kinney's merely to show clearly how the miners in those days actually did make their locations and how they claimed their ground. They agreed upon a base line, and then one man took 100 feet and another took 200 feet, another took 150 feet, another 300 feet, or a group of claimants took 300 feet, and so on; and in this way the entire lode was divided up and these upright or perpendicular lines show how the vein was taken in its course downward into the earth.

If your Honor please, I would like to know if there is anything in this representation to indicate that in those early days, anything but strict parallelism between the end lines of the different claims located was allowed to prevail? It has been frequently claimed that end lines were formerly not considered by the miners. This is a long decision, and it discusses the subject of end lines

from its beginning to its close, and calls for end lines, and nothing but parallelism is considered from the beginning to the close of this important case. This is how it was done in the old days. There is a great deal of talk afloat, and I am certain that my friend Judge Lindley is responsible for some of it—responsible to a large extent for the idea that prevails in some mining communities that there was a time when men might take their locations any way they pleased. Such a time never existed in the history of mining from the beginning. When the miners entered upon the public lands, this (pointing to Diagram O) is the method by which they defined the bounding planes between their respective rights.

Turning to the history of the Eureka case, and reading the arguments of Judges Heydenfeldt and Mesick, we see what they said as advocates in that high court. It was always parallelism.

I will not take up the time of the Court in reading the language of Judge Sawyer. It is substantially as I have stated it, and the Kinney case is fully illustrative of what I have stated as the universal custom.

**Location with Parallel End Lines Under Miners' Rules. The Eureka Case in the Circuit Court.**

But it is not necessary for your Honor to rely upon my dictum in these matters. Take the case upon which Mr. Lindley relies for a decision in the case at bar, and let us see if there is any thing in that—in the Eureka case—except strict parallelism. The remarks I am about to

read were made by the Court, as stated by Mr. Lindley yesterday, because of the claim of the Richmond Company that these ore bodies were not lodes, and that they could go outside of these end lines on the strike of the ore bodies wherever they pleased. (Referring to Diagram P).

(Reads from the Eureka case, 4 Sawy. 321): "Now, as

"neither the rules of miners in Eureka Mining district,
"nor the Act of 1866, in terms speak of end lines to loca-
"tions made on ledges, nor in terms impose any limita-
"tion upon miners following these veins wherever they
"may lead, it is contended that no such limitation can
"be considered as having existed and be enforced
"against the defendant. The Act of 1866, it is said,
"recognizes the right of the locator to follow his vein
"outside of any end lines drawn vertically down when it
"permits him to obtain a patent granting his mine 'to
"'gether with the right to follow such vein or lode with its
"'dips, angles and variations to any depth, although it
"'may enter the land adjoining, which land adjoining
"'shall be sold subject to this condition.'
"It is true that end lines are not in terms named in the
"rules of miners." This discussion refers now—and I

am presenting these diagrams for the purpose of showing to your Honor how this matter was from the time of the inception of the mining business before the Act of 1866 was passed.

(Continues reading from Eureka case, 4 Sawy. 322)

"It is true that end lines are not in terms named in the
"rules of the miners, but they are necessarily implied,
"and no reasonable construction can be given to them
"without such implication. What the miners meant by

"allowing a certain number of feet on a ledge was that "each locator might follow his vein for that distance on "the course of the ledge and to any depth within that "distance. So much of the ledge he was permitted to "hold as lay within vertical planes drawn down through "the end lines of his location, and could be measured "any where by the feet on the surface."

Which is exactly as represented on this diagram (referring to Diagram O). Judge Field was entirely familiar with the Comstock lode, and the method of its location and holdings, and the description he gives applies exactly to this condition of affairs. I repeat: "So much "of the ledge he was permitted to hold as lay within ver- "tical planes drawn down through the end lines of his "location, and could be measured any where by the feet "on the surface. If this were not so, he might by the "bend of his vein hold under the surface along the course "of the ledge double and treble the amount he could take "on the surface. Indeed, instead of being limited by the "number of feet prescribed by the rules, he might in "some cases oust all his neighbors and take the whole "ledge. No construction is permissible"—in spite of what Mr. Lindley says here—"*No construction is permissi-* "*ble which would substantially defeat the limitation of quan-* "*tity on a ledge, which was the most important provision in* "*the whole system of rules.*"

How about parallelism here? This is the Eureka case, upon which Mr. Lindley relies! (Continues reading) "Similar rules have been adopted in numerous mining "districts and the construction thus given has been uni- "formly and every where followed. We are confident "that no other construction has ever been adopted in any "mining district in California or Nevada; and the con- "struction is one which the law would require in the ab- "sence of any construction by miners. If, for instance,

"the state were to-day to deed a block in the city of San "Francisco to twenty persons, each to take twenty feet "front in a certain specified succession, each would have "assigned to him by the law a section parallel with that "of his neighbor of twenty feet in width cut through the "block. No other mode of division would carry out the "grant."

If this map (referring to Diagram O) had been made to illustrate the Eureka case, it could not have been made better for the purpose.

So, then, up to the time referred to in this discussion in the Eureka case, nothing but strict parallelism had prevailed any where among the miners of California or Nevada:

"NO CONSTRUCTION IS PERMISSIBLE WHICH "WOULD SUBSTANTIALLY DEFEAT THE LIMITA- "TION OF QUANTITY ON A LEDGE, WHICH WAS "THE MOST IMPORTANT PROVISION IN THE "WHOLE SYSTEM OF RULES."

Is it any wonder that when the statute of 1872 was passed, it said, "the end lines of each claim shall be par- "allel to each other?"

## Location with Parallel End Lines Under the Act of 1866. The Statute.

We now come, if your Honor please, in chronological order, down from the time when mines were located under miners' rules as described by Judge Field and as illustrated by Judge Sawyer, to the time of the passage of the Act of 1866. It is always well, it seems to me, to

look closely into the statute. Your Honor will pardon me for quoting the remark of an eminent judge made in my presence to a body of law students, when he said: "Gentlemen, always be sure you know the common law, "but never be sure you know the statute." And I venture to say that ninety-nine hundredths of the confusion upon this subject of end lines in mining matters, have arisen from the fact that lawyers and miners have taken it for granted, without examination, that the law of 1866 did not undertake to confine the miner within parallel end lines.

Your Honor will notice that Judge Field makes no such statement. He merely says that the act of 1866 does not "*in terms*" mention end lines, and that the rules of miners did not mention end lines "*in terms*," but he says that they were necessarily implied by the rules themselves.

Now let us see what the statute says. The first section of the statute of 1866 is almost exactly the same as the first section of the statute of 1872, and it says: "Sec. 1. "That the mineral lands of the public domain, both sur- "veyed and unsurveyed, are hereby declared to be free "and open to exploration and occupation by all citizens "of the United States, and those who have declared their "intention to become citizens, subject to such regula- "tions as may be prescribed by law, and subject also to "the local customs or rules of miners in the several min- "ing districts, so far as the same may not be in conflict "with the laws of the United States."

Sec. 2 refers to the method of obtaining patents. I will not read it at this time, nor will I read section 3 at this time.

Sections 4 and 5 are the two sections I now desire to read to the Court. Section 4 is as follows:

"Sec. 4. That when such location and entry of a mine "shall be upon unsurveyed lands, it shall and may be "lawful, after the extension thereto of the public sur- "veys, to adjust the surveys to the limits of the premises "according to the location and possession and plat "aforesaid; and the Surveyor General may in extending "the surveys vary the same from a rectangular form to "suit the circumstances of the country and the local "rules, laws and customs of miners; *Provided*, that no "location hereafter made shall exceed 200 feet in length "along the vein for each locator, with an additional "claim for discovery to the discoverer of the lode, with "the right to follow such vein to any depth with all its "dips, variations and angles together with a reasonable "quantity of surface for the convenient working of the "same as fixed by local rules: *And provided further*, that "no person may take more than one location on the same "lode, and not more than 3,000 feet shall be taken in any "one claim by any association of persons."

Now, to show your Honor how easy it is to misunderstand the statute, in that excellent work "Lindley on Mines," this very section is quoted on page 675, and on that same page, the author states that no provision is made in the act of 1866 for the taking of any piece of land *as an act of location*, though the language of the section is: "No location hereafter made shall exceed 200 feet "in length along the vein for each locator with an ad- "ditional claim for discovery to the discoverer of the "lode, with the right to follow such vein to any depth "with all its dips, variations and angles, together *with a "reasonable quantity of surface for the convenient working of "the same.*"

I refer to this, not by any means to speak in derogation of Mr. Lindley's book. It has received the commendation of the highest court of the land—parts of it. It is safe to say that no one could handle the immense mass of material handled by Mr. Lindley without making some mistakes, possibly great mistakes, as we think he has made in his construction of the Eureka case and in his philosophic disquisition upon the subject of what rights were secured by locators before the passage of the Act of May 10, 1872, when their end lines diverged in the direction of the dip of the lode.

Now, if your Honor please, the language of this statute of 1866 is exactly in accordance with the miners' rules:

"No location hereafter made shall exceed 200 feet in "length along the vein for each locator * * * with "the right to follow *such* vein any depth."

Can there be any doubt that this means that the locator can only follow his 200 feet? And so it necessarily follows that although the Act of 1866 does not say anything about end lines in terms, it means that a location made under the Act of 1866 must either be with parallel end lines or with converging end lines. It is not within the power of human reason to reach any other conclusion from a reading of the statute, and if it should appear that there is to-day upon the books a decision of any Court to any other effect, and in contravention of this statute, it would be the duty of every Court to construe the statute so as to overrule such decision and to decide according to law—according to the statute—because, as stated by Justice

Brewer in the Del Monte case, the question here "is not, *What is equity? but, What saith the statute?*" And the statute says that no location shall exceed 200 feet.

**Location with Parallel End Lines Under the Act of 1866. The Eureka Case in the Circuit Court.**

I do not ask your Honor to take my dictum upon this subject. Going back to the Eureka case, I read from page 323 of 4th Sawyer:

"The Act of 1866 in no respect enlarges the right of the "claimant beyond that which the rules of the mining "district gave him." Parallel end lines!—"The patent "which the act allows him to obtain does not authorize "him to go outside of the end lines of his claim, drawn "down vertically through the ledge or lode. It only "authorizes him to follow his vein, with its dips, angles "and variations to any depth although it may enter land "adjoining, that is, land lying beyond the area included "within his surface lines. It is land lying on the side of "the claim, not on the ends of it, which may be entered."

And that means to the fullest extent what is claimed by us, that he cannot bound his claim with swelling or diverging end lines; he must go down between parallel end lines. And that is the doctrine of the Eureka case from the beginning to its close.

(Continues reading from 4 Sawy. 323) "The land on "the ends is reserved for other claimants to explore. It "is true, as stated by the defendant, that the surface land "taken up in connection with a linear location on the "ledge or lode is, under the Act of 1866, intended solely "for the convenient working of the mine and does not "measure the miner's right, either to the linear feet upon

" its course or to follow the dips, angles and variations of " the vein, or control the direction he shall take."

This doctrine is distinctly overruled by the Flagstaff case and all the cases that follow it.

(Continues reading) " But the line of location taken " does measure the extent of the miner's right. That " must be along the general course, or strike, as it is " termed, of the ledge or lode. Lines drawn vertically " down through the ledge or lode at right angles with a " line representing this general course at the ends of the " claimant's line of location will carve out, so to speak, a " section of the ledge or lode within which he is per- " mitted to work and out of which he cannot pass."

Here is the strictest of strict parallelism!

**Location with Parallel End Lines Under the Act of 1872. The Eureka Case in the Circuit Court.**

(Continues reading from Sawy. 323, 324)

" The Act of 1872 preserves to the miner the rights ac- " quired under the Act of 1866 and confers upon him ad- " ditional rights. Under the Act of 1866 he could only " hold one lode or vein although more than one appeared " within the lines of his surface location. The surface " ground was allowed him for the convenient working of " the lode or vein located and for no other purpose; it " conferred no right to any other lode or vein. But the " Act of 1872 alters the law in this respect. It grants to " him the exclusive right of possession to a quantity of " surface ground not exceeding a specified amount, and " not only to the particular lode or vein located but to " all other veins, lodes and ledges, the top or apex of " which lies within the surface lines of his location, with " the right to follow such veins, lodes or ledges to any " depth. But these additional rights are granted subject

"to the limitation that in following the veins, lodes or "ledges, the miner shall be confined to such portions "thereof as lie between vertical planes drawn downward "through the end lines of his location, and a further "limitation upon his right in cases where two or more "veins intersect or cross each other."

Now, if your Honor please, if there were any possible doubt as to what these two statutes mean, that doubt is solved by the next language:

"THE ACT IN TERMS ANNEXES THESE CONDI-"TIONS TO THE POSSESSION NOT ONLY OF "CLAIMS SUBSEQUENTLY LOCATED, BUT TO THE "POSSESSION OF THOSE PREVIOUSLY LOCATED. "THIS FACT TAKEN IN CONNECTION WITH THE "RESERVATION OF ALL RIGHTS ACQUIRED "UNDER THE ACT OF 1866 INDICATES THAT IN "THE OPINION OF THE LEGISLATURE NO "CHANGE WAS MADE IN THE RIGHTS OF PRE-"VIOUS LOCATORS BY CONFINING THEIR CLAIMS "WITHIN THE END LINES. THE ACT SIMPLY "RECOGNIZED A PRE-EXISTING RULE APPLIED "BY MINERS TO A SINGLE VEIN OR LODE OF THE "LOCATOR, AND MADE IT APPLICABLE TO ALL "VEINS OR LODES FOUND WITHIN THE SUR-"FACE LINES."

(*At this point the further argument of this case was continued until the next day, Wednesday, October 19, 1898, at 10 o'clock A. M., when Mr. Wright resumed his argument as follows*):

For the benefit of Mr. Lindley, I will read to your Honor a paragraph I neglected to read yesterday because, in my opinion then and in my opinion now, it has no particular bearing on this case; but, in order to make certain that I am not overlooking anything, I will read it:

(Reading from 4 Sawy. 323) "As the Act of 1866 re-
"quires the applicant for a patent to file in the local
"office a diagram of his claim, such diagram must neces-
"sarily present something more than the mere linear
"location. It is intended that it should embrace the
"surface claim for the working of the mine. In this way
"each of the patents of the parties embraces one or more
"acres, and the fraction of an acre of surface ground and
"some hundred linear feet on the lode."

As I showed your Honor yesterday, the location of the surface ground is part of the location under the Act of 1866, necessarily so from the language of the section.

**The Rule of Parallelism Universal.**

Down to the present point in this argument, we have shown, and, as we think, conclusively, that under the miners' rules, parallel end lines were required in all cases. As Judge Field says, "NO OTHER CONSTRUCTION "HAS EVER BEEN ADOPTED IN ANY MINING "DISTRICT IN CALIFORNIA OR NEVADA."

We have shown that under the Act of 1866 a legal location must have been made in such way as to have either parallel end lines or converging end lines, this necessarily following from the language of the statute, which says that no locator can locate more than 200 feet along the lode.

I have found no better language covering this point than that used by Judge Heydenfeldt in his argument in this very Eureka case. He says:

"It is true that, while the Act of 1866 does not spec-
"ifically define that they should be confined within their

"end lines, yet it makes them subordinate in their loca-
"tions to the ordinary rules and regulations of miners,
"and we all understand enough of them to enable the
"Court to take judicial notice of the fact that the laws,
"rules and regulations of miners in the location of ledges
"always were accompanied with the distinct understand-
"ing that parties should be confined within their end
"lines running parallel to the base of their location. If
"that were not so it would be entirely absurd to say that
"a party locating should be confined to so many linear
"feet, because the very instant that you say that a party
"locating so many linear feet can cross his end lines, why,
"as a matter of course, you give him the privilege of tak-
"ing away from every body else's location of linear feet."

Now we have shown from the Eureka case, brought into this discussion by Mr. Lindley himself, that the Act of 1866 in no way extended the miner's right, and we have shown further, and I desire your Honor to listen patiently while I repeat this portion from 4 Sawy. 324:

"The act in terms annexes these conditions to the pos-
"session NOT ONLY OF CLAIMS SUBSEQUENTLY
"LOCATED BUT TO THE POSSESSION OF THOSE
"PREVIOUSLY LOCATED. THIS FACT TAKEN IN
"CONNECTION WITH THE RESERVATION OF ALL
"RIGHTS ACQUIRED UNDER THE ACT OF 1866, IN-
"DICATES THAT IN THE OPINION OF THE LEGIS-
"LATURE NO CHANGE WAS MADE IN THE
"RIGHTS OF PREVIOUS LOCATORS BY CONFIN-
"ING THEIR CLAIMS WITHIN THE END LINES."
This refers to the Act of 1872. "THE ACT SIMPLY
"RECOGNIZED A PRE-EXISTING RULE APPLIED
"BY MINERS TO A SINGLE VEIN OR LODE OF THE
"LOCATOR, AND MADE IT APPLICABLE TO ALL
"VEINS OR LODES FOUND WITHIN THE SURFACE
"LINES."

I might as well at this point read the actual conclusion reached by the Court in this case. Of course your Honor understands that I am reading from the decision rendered by the three judges sitting in bank in the Circuit Court, Judges Field, Sawyer and Hillyer. They say, 4 Sawy. 324:

"Our opinion, therefore, is that both the defendant "and the plaintiff by virtue of their respective patents, "WHETHER ISSUED UPON LOCATIONS UNDER "THE ACT OF 1866, OR UNDER THE ACT OF 1872, "WERE LIMITED TO VEINS OR LODES LYING "WITHIN PLANES DRAWN VERTICALLY DOWN-"WARD THROUGH THE END LINES OF THEIR "RESPECTIVE LOCATIONS; and that each took the "ores found within those planes at any depth in all veins "or lodes, the apex or top of which lay within the surface "lines of its location."

**Method of Drawing End Lines. The Eureka Case in Circuit Court.**

Now a great deal and perhaps most of the confusion that has arisen in these matters, has arisen from the fact that parties fail to take notice of the distinction between *the end lines of a surface location* and *the actual end line planes* bounding the miner's right. The rule established, or rather the rule undertaken to be established—for I do not hesitate to say to the Court, as I will prove later, that the rule was never established excepting for the short time that this particular decision remained the law of the land—the rule adopted in this case is shown by the language which I shall now read to the Court from 4 Sawy. 319:

"The provision of the statute of 1872, requiring the "lines of each claim to be parallel to each other, is merely "directory, and no consequence is attached to a devia- "tion from its direction. ITS OBJECT IS TO SECURE "PARALLEL END LINES DRAWN VERTICALLY "DOWN AND THAT WAS EFFECTED IN THESE "CASES BY TAKING THE EXTREME POINTS OF "THE RESPECTIVE LOCATIONS ON THE LENGTH "OF THE LODE."

Nothing can be plainer than this, nothing can be plainer than that at this stage of these decisions, the old rule exercised or followed by the miners, was followed by the Court here. The lode was examined and the end lines were drawn through the end points of the location. There is no part of this decision where parallelism is lost sight of. Parallelism is made the cardinal doctrine of the case, and by the language I quoted to your Honor several times yesterday, which says:

"NO CONSTRUCTION IS PERMISSIBLE WHICH "WOULD SUBSTANTIALLY DEFEAT THE LIMITA- "TION OF QUANTITY ON A LEDGE, WHICH WAS "THE MOST IMPORTANT PROVISION IN THE "WHOLE SYSTEM OF RULES."

But as to the method by which these parallel end lines were ascertained, it was as I have described and as laid down here, and the Court held that the provision of the Law of 1872 that the end lines shall be parallel to each other, was merely directory and no consequence attached to a deviation from its direction.

In other words, locations made before May 10, 1872, and locations made afterwards, were put upon the same

plane and subjected to the same rule and that rule a flexible one, the very flexible rule which was the very cause of the adoption of the Act of 1872. This rule was so flexible that under it the end lines of a claim could never be exactly ascertained until a very considerable development of the vein, because the end lines were drawn down at right angles to the course or strike of the vein. This will illustrate it here. (Showing as on Diagram Q.) Here is the general course or strike of the vein as indicated by these underground levels (showing). If the rule were applied here (showing) it would result in the manufacture of two lines exactly as Mr. Lindley has drawn these blue lines on this map. This line (showing) was drawn from the north end point of the Pioneer lode and this line (showing) was drawn from the south end point of the Pioneer lode, at right angles to the general strike or course of the vein as found within the Pioneer Mine. Lest the Court may think I am mistaken, I will read the language again:

"ITS OBJECT IS TO SECURE PARALLEL END "LINES DRAWN VERTICALLY DOWN, AND THAT "WAS EFFECTED IN THESE CASES BY TAKING "THE EXTREME POINTS OF THE RESPECTIVE "LOCATIONS ON THE LENGTH OF THE LODE."

Now this defendant has nothing to fear from such a rule in the case at bar. The strange thing is that the plaintiff should have invoked it. There is nothing in this record, if your Honor please, to show which of these claims was located first. From all that appears in the

record, from all the knowledge that is obtainable, the Kennedy Mine was located first. The Kennedy Mine was patented first and so must be considered prior for all the purposes of this case. The titles would be construed as from the dates of the respective patents and we would have this state of affairs:

Here, if your Honor please (showing as on Diagram J[1]) you can see this green line drawn from the north end point of the lode on the Kennedy Mine to the south end point.

MR. LINDLEY. (Interrupting.) One moment, Mr. Wright. I will ask you to point out any where in the record where the course of the Kennedy vein throughout the Kennedy ground is established, either by—

MR. WRIGHT. By these end points (showing).

MR. LINDLEY. They do not show the course of the vein through the ground.

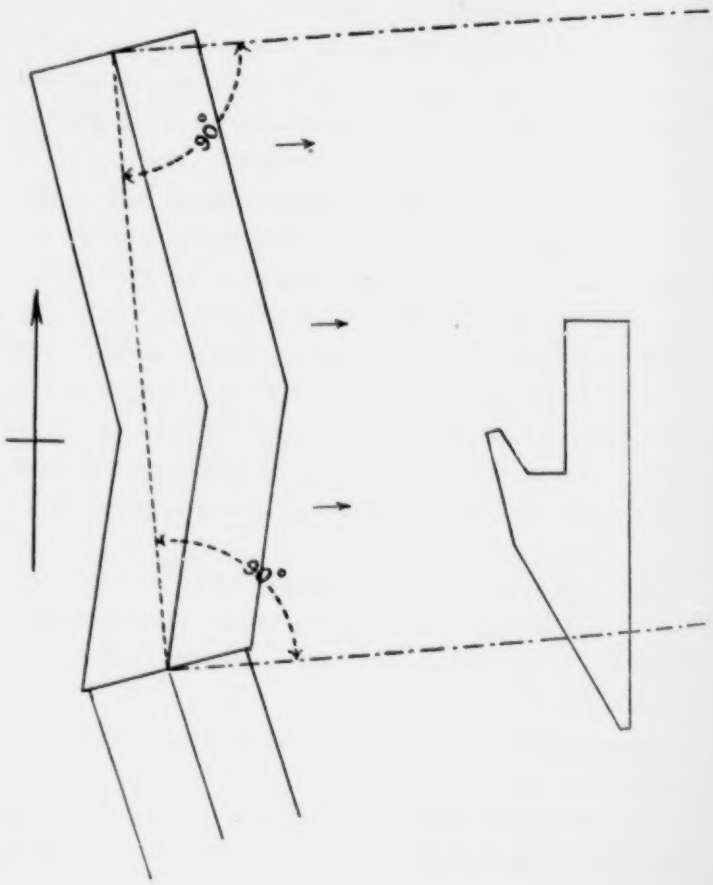
MR. WRIGHT. You stated in your argument that they established the course of the vein for that case (referring to Pioneer claim).

MR. LINDLEY. I interpose an objection here to the statement of counsel, particularly when counsel says that the patent of the Kennedy Company has no place in this action.

MR. WRIGHT. I say so; I am speaking of it to the Court simply for the purpose of illustration.

MR. LINDLEY. Well, then, you may assume it for the purpose of illustration, but I object to your stating as a fact that the course of that vein is as you stated a mo-

# Diagram J[1].



ment ago. You may assume whatever you please, of course.

MR. WATERS. The general course.

MR. WRIGHT. I am taking the end points of this location as the rule is stated to be in this case which Mr. Lindley has brought before this Court.

MR. LINDLEY. I said nothing about the north extreme point of the Kennedy lode; I have referred to the south extreme point, but I never went beyond it.

MR. WRIGHT. Now, if your Honor please, I did not drag the Kennedy Mine into this case, and I state further that I am using this merely for the purpose of illustrating this argument, and I say I have a right to bring a hundred mining claims in here and to illustrate from each and every one of them, if the Court will have the patience to listen.

MR. LINDLEY. Oh, I am not objecting to your assuming a course.

MR. WRIGHT. Mr. Lindley need have no fear that I will ask him to subject himself to the absurd rule that he has advanced to this Court, absurd in his contention that it is the law of the land to-day. I say that if this rule were applied in this case, taking these patents as they stand upon the record and applying the rule that Mr. Lindley himself has invoked, this is the state of affairs that we would have: Our south end line would be drawn here (showing as on Diagram J[1]). The record shows that this mine was patented first. Our north end line would be drawn in this manner (showing as on Dia-

gram J[1]) and the ore in dispute would be within the boundaries of the claim so given to the Kennedy Mine. IF THE COUNSEL FOR THE ARGONAUT COMPANY WISHES THE RULE OF THE EUREKA CASE ESTABLISHED FOR THE PURPOSES OF THE CASE AT BAR, I DO NOT THINK HE WILL HAVE ANY DIFFICULTY ABOUT GETTING COUNSEL UPON THE SIDE OF THE DEFENDANT TO STIPULATE THAT THE EUREKA CASE SHALL BE CONSIDERED AS THE RULE, SO FAR AS THE EUREKA CASE GOES IN ESTABLISHING THE LAW OF END LINES. HE HAS INVOKED THE RULE ; LET HIM FOLLOW IT TO ITS ULTIMATE CONSEQUENCES.

I say this is the consequence, and it is impossible in the light of human reason to deny it. I say that this is the rule that was established by the Court in the Eureka case. It is the rule that was contended for by Chief Justice Waite in the Elgin case, as the rule that should prevail, even as late as that case. But it is not the law of the land to-day. THE EUREKA CASE WAS THE CULMINATION AND THE END OF THE OLD REGIME.

We have now reached the point in the history of mining in this country when this old rule was abrogated, and because of the Act of 1872.

The Eureka case is the last of the great cases decided under this rule. Some of the greatest mining judges think it should still be the rule. Judge Beatty, who rendered the Circuit Court decision in the North Star case,

makes no secret of his opinion that it should continue to prevail. Judge Hawley on all occasions favors it in his decisions as far as he can go. But the law of the land is against it, as I shall proceed to show.

Now, if your Honor please, I have reached the end of my discussion of the Eureka case in the Circuit Court so far as the matter is shown by the published decision. I have confined myself strictly to the language of the decision. There is no possible mistake, there is no possible way of escaping the conclusions I have read and presented to your Honor.

## The Two Leading Doctrines of the Eureka Case in the Circuit Court.

The doctrine of end lines as I have stated it, is one of the doctrines of this case, and the other doctrine is, that the surface location under the Act of 1866, did not measure any underground right of the miner, but was intended merely for the convenient working of the mine. These are the two doctrines.

In this argument we must follow these two and first find out what becomes of them, and I must recur to the Eureka case itself for the starting point.

## Congress Retains Control of Patented Mines.

If your Honor please, I will read from the Act of 1866 a section that was not repealed by the Act of 1872. (reading)

"Sec. 5. And be it further enacted, that, as a further "condition of sale, in the absence of necessary legisla- "tion by Congress, the local legislature of any state or "territory may provide rules for working mines, involv- "ing easements, drainage or other necessary means to "their complete development; and those conditions shall "be fully expressed in the patent."

The full meaning of this paragraph I will not undertake to define at this moment. Your Honor will see fully the bearing of it as the argument progresses.

I repeat: "And be it further enacted, That, as a fur- "ther condition of sale"—

—that is, of patenting lands under the Act of 1866—

"in the absence of any necessary legislation by Con- "gress, the local legislature of any state or territory may "provide rules for working mines, involving easements, "drainage or other necessary means to their complete "development; and those conditions shall be fully "expressed in the patent."

We may say at this time that one thing is surely set forth in this section, and that is that Congress specially reserves the power to control the mines patented under the law of 1866, and, furthermore, this is one of the sections which was not repealed by the Act of 1872, consequently, your Honor, a clause prepared under this section of the statute is inserted in every patent issued.

Now, the popular idea of these patents is, and Judge Lindley has proceeded in his argument on this idea, that just as soon as one of these mining patents is granted, all control over it by Congress ceases. In fact, his argument goes even to the extent that the rights become vested by the Act of location itself. His argument all of the day

before yesterday went to show that the act of location under the Act of 1866 vested the right; but here is a clear reservation of the right of control by Congress.

**The Act of 1872 Controls Mines Located Under the Act of 1866. Bill of Exceptions in Eureka Case.**

Now, in the discussion of Monday last, a large part of the record in the Eureka case was brought in and was read to the Court. I, too, desire to read from the record of the Eureka case, and to give just emphasis to those parts which I think are properly applicable. And I will read first, the fourth proposition of law advanced by the defendant company, that is to say, by the company that was defeated in the case. (Reads from Bill of Exceptions in the Eureka case)

"4th. The rights and interests of claimants as re-
"ferred to in the last preceding proposition were not im-
"paired or affected in any way by the Act of May 10th,
"1872, above referred to."

Counsel for the defendant in the case asked the Court to rule in that way, and the ruling of the Court is as follows:

"4th. The fourth proposition is sustained, the words
"'*except as specified in the Act of 1872*' being added at the
"end."

Nothing can be plainer than this, if your Honor please. Throughout the Eureka case from the beginning to the end, in its ruling upon these propositions of law as well as in the law as laid down in the published decision, the

Act of 1872 is held as controlling. I am sure your Honor will permit me to read this again for greater precision, but I will read the context first. The third proposition of law advanced by the defendant is as follows:

"3d. Claimants on mining lands under the said act "of July 26th, 1866, who had, prior to the 10th day of "May, 1872, complied with the terms of said first named "act, and to which there was no adverse claim, were en- "titled to enter such land."

Compliance with the said first named act, I may say parenthetically, does not mean locating a claim with diverging end lines. It means locating a claim according to the statute, with no more than two hundred feet for each locator. I repeat:

"who had prior to the 10th day of May, 1872, complied "with the terms of said first named act and to which there "was no adverse claim, were entitled to enter such land, "and receive a patent therefor, granting such mine, to- "gether with the right to follow such lode or vein therein "with its dips, angles and variations although it might "enter the land adjoining, together with a reasonable "quantity of surface for the convenient working of the "same as fixed by local rules."

The Court say: "3d. The third proposition is sus- "tained, the words '*to any depth*' being inserted."

Now, if your Honor please, if this proposition stood alone, it might in some slight degree support the contention of counsel, but it does not stand alone. These propositions of law must be considered together, and the very next proposition is the one that I first read and which is from necessity the controlling one, because it is based

upon the statute and the last statute, which it upholds.

I repeat the fourth proposition:

"4th. The rights and interests of claimants as re-
"ferred to in the last preceding proposition were not im-
"paired or affected in any way by the act of May 10th,
"1872, above referred to."

Here is an attempt to get this high court to decide that the Act of 1872 could not impair any rights whether of location or of patent or under a patent, but the Court was not caught in the trap. They say in answer:

"4th. The fourth proposition is sustained, the words
"'*except as specified in the Act of 1872*' being added at the
"end."

That is to say, the rights of locators under the Act of 1866 were not impaired, EXCEPT AS PROVIDED BY THE ACT OF 1872.

The fifth proposition advanced is as follows:

"5th. Claimants entitled to patents under the Act of
"1866 above referred to, applying for the same after the
"10th day of May, 1872, were entitled to receive a patent
"granting to them their mines located prior to the last
"named date, together with the right to follow their veins
"or lodes with their dips, angles and variations to any
"depth although they might enter the lands adjoining,
"together with a reasonable quantity of surface for the
"convenient working of the same as fixed by local rules,
"and in addition thereto all other veins and ledges
"throughout their entire depths the tops or apexes of
"which lie inside of such surface lines extended down-
"ward vertically, although such veins, lodes or ledges
"might so far depart from a perpendicular course down-
"ward as to extend outside the vertical side lines of the

" surface locations, subject to the provisions of section 3 " of said Act of Congress of May 10, 1872."

The ruling of the Court on this proposition is:

" 5th. The fifth proposition is substantially correct, " and is sustained."

But the Court has just established the proposition that these locations are subject in all their parts and to all intents and for all purposes to the law of May 10, 1872, and it has refused to say that they were not impaired by the law of 1872, so far as that applies.

The seventh proposition is this:

" 7th. That the said patents to the defendants offered " in evidence do not, as to the special and particular lodes " therein named respectively, limit or confine the de- " fendants in their right to follow the vein or lode, with " its dips, angles and variations in their depth to such " portions thereof as lie between vertical planes drawn " downward through the end lines of the location of the " surface ground so continued in their own direction that " such planes will intersect the exterior parts of said " veins or ledges, but that such limit or restraint only " applies to the veins or lodes other than the special lodes " named and granted, which other lodes have their tops " or apexes inside said surface lines extended downward " vertically."

Here is a clear attempt to get the Court to say that special privileges attached to the particular lode located under the Act of 1866 and that the restrictions of the Act of 1872 apply only to the new lodes granted by the Act of 1872, the apices of which are within the lines of the

old location. There seems to have been the same idea then that prevails now to some extent, that some special right attaches to the particular lode, the special lode, located.

Let us see what the Court says:

"7th. The seventh proposition is not sustained by the "Court."

No man has argued more eloquently than the chief counsel for the plaintiff, against permitting the enjoyment of rights in respect of these additional lodes granted under the Act of 1872, greater than the rights that were enjoyed in respect of the lode originally located, and I am glad to say that counsel's view was established long ago, so far as it could be established by this great tribunal.

Now here is another attempt:

"8th. That the defendant under its said patent for "the Richmond Mining ground was and is authorized to "follow the vein or lode therein called the Richmond lode "with its dips, angles and variations although it may "enter the land adjoining, and that the first proviso in "said patent contained does not apply to said Richmond "lode."

This is one of the three propositions which the Court does not answer here, but says that it answers them in the decision, the published decision, from which I have already read.

Now, these are the important propositions that were advanced and ruled upon in the Bill of Exceptions in the Eureka case. They are all controlled by number four.

The ruling on number four is necessarily the basis of them all. And so, whatever the law may be, whether of 1866 or of 1872, and whatever the conditions may be, I say they are controlled by the Act of May 10, 1872, even to the extent of the impairment of rights which were supposed to be established.

MR. LINDLEY. In other words, they impair the right acquired by a certificate of purchase issued by the government?

MR. WRIGHT. I will reach that all in due time, and to your entire satisfaction, I hope.

MR. LINDLEY. Excuse me for interrupting you, Mr. Wright.

MR. WRIGHT. That is all right; I simply wish to give you notice now that I shall discuss that to the fullest extent.

**End Line Rule of the Eureka Case in the Circuit Court. Finding 17.**

There is only one other part of the record of the Eureka case outside of the published decision, to which I wish to refer. It is that one of the findings which is to the effect that the ore in dispute, which was this Potts Chamber (showing as on Diagram P) lay between the parallel end lines of the Champion, that is, between the parallel surface end lines extended, and also between end lines drawn down through the end points of the At Last and the Margaret respectively.

To Mr. Lindley. Do you remember the number of that finding?

MR. LINDLEY. Finding 17.

MR. WRIGHT. I will read it:

"17th. That the mining ground in dispute is situated "within the lode or ledge as hereinbefore described, and "within planes drawn vertically down through the end "lines of the plaintiff's patented location of the Cham- "pion claim, and within planes drawn vertically down "through the extreme points of the patented locations "of the At Last and the Lupita or Margaret claims at "right angles to the course or strike of the said lode or "ledge and produced so as to follow the dip of the lode. "The top or apex of said lode is within the surface lines "of said patents to the plaintiff, and said lode dips at "right angles to its course and on such dip extends un- "der the surface of the Utah and Arctic claims of de- "fendants."

I read this finding merely for the purpose of accentuating the fact that the Court undertook by its decision to establish as a rule of law, that the requirement for parallelism of end lines under the Act of 1872 was merely directory, and that the proper way to ascertain the end lines was to find the end points, and then to extend planes through those points down across the strike of the lode. There is no other rule of law established in that case as to end lines.

Such is the Eureka case, which was introduced into this Court and into this cause, with what counsel will pardon me for calling a great flourish, as though it were the end of all things.

If your Honor please, I do not think I have lacked candor in discussing this case. If there is any other element in the case, I confess I have failed to observe it.

There is nothing in it which the defendant need fear to meet under the existing condition of the decisions. It is our starting point; and, as I said a while ago, it is the culmination as it is the end of the old conditions.

## The Flagstaff Case.

In order to be perfectly frank in this discussion, it is proper for me before taking up the Eureka case in the United States Supreme Court, to discuss the Flagstaff case, which intervenes in point of time.

The Eureka case was decided in the Circuit Court on August 22, 1877; the Flagstaff case was decided in the Supreme Court of the United States on May 5, 1879, a little less than two years thereafter.

I called your Honor's attention a moment ago to the fact that there are two main mining law propositions developed by the Eureka case, the one as to the method of drawing end lines, and the other the proposition twice stated, at least twice, to the effect that the land included within one of the 1866 locations did not in any way define the miner's underground rights:

I repeat from the Eureka case, 4 Sawy. 323:

> " It is true as stated by the defendant, that the surface " land taken up in connection with a linear location on " the ledge or lode is, under the Act of 1866 intended " solely for the convenient working of the mine, and does " not measure the miner's right, either to the linear feet " upon its course, or to follow the dips, angles and varia- " tions of the vein or control the direction he shall take."

This is distinctly laid down as law. Let us see what becomes of it.

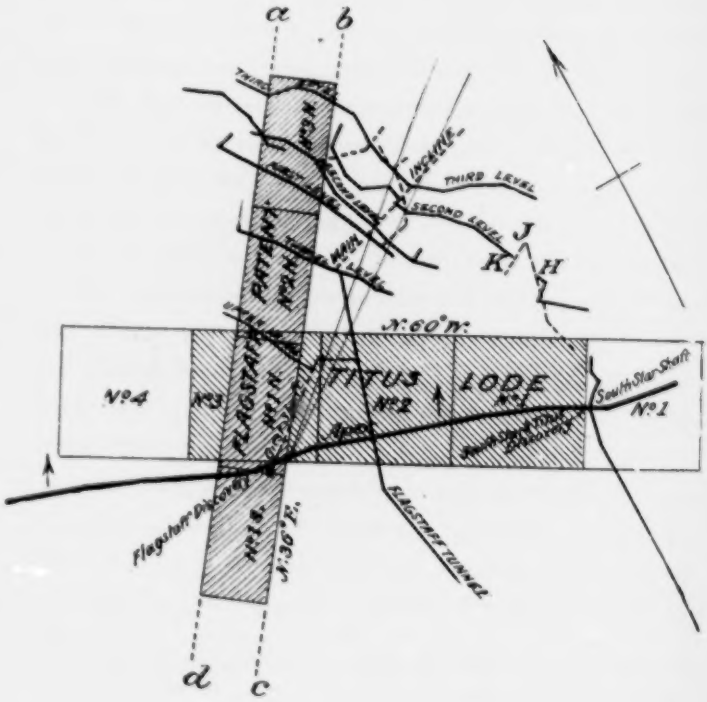
Now the Flagstaff case appears very interesting. I am sorry I haven't a plat. But Judge Lindley has made it unnecessary for me to have one made. If your Honor will kindly glance at this diagram (hands book to Court) the one in reference to the Flagstaff case. (showing Diagram same as Diagram A[1]).

MR. LINDLEY. The one on the left hand page.

MR. WRIGHT. If your Honor please, the language of Judge Field which I have just read, expresses one of the most cherished doctrines of the old miner, namely, that he might take his vein anywhere, regardless of his surface lines. It is illustrated in the extreme in this Flagstaff case, where only 100 feet of the lode were included within the surface lines, though 2600 feet were claimed, the other 2500 feet extending outside, and not being clearly defined by the patent. This is another one of those cases, I may say parenthetically, that show how these mining patents may be attacked by extrinsic evidence showing the underground conditions. The claim here was for 2600 feet, and the owners of the Flagstaff mine claimed that they might take 2600 feet of the vein, wherever it might go. I will not read all of the Flagstaff case to your Honor, as that would be too tedious. I will read the following, Flagstaff v. Tarbet, 98 U. S. 463:

"The Court refused to give the following instructions "propounded by the plaintiffs in error, to wit: 'By the "'Act of Congress of July 26, 1866, 14th stat. at L. 253, "'under which all these locations are claimed to have "'been made, it was the vein or lode of mineral that was "'located and claimed; the lode was the principal thing,

# Diagram A[1].


a
b
c
d
THIRD LEVEL
SECOND LEVEL
J
K
H
N:60°W:
No4
No3
FLAGSTAFF PATENT
No2
TITUS
No1
LODE
South Star Shaft
No1
Flagstaff Discovery
No1S.
N:36°E:
FLAGSTAFF TUNNEL

"'and the surface area was a mere incident for the con-
"'venient working of the lode; the patent granted the
"'lode, as such, irrespective of the surface area, which an
"'applicant was not bound to claim; it was his con-
"'venience for working the lode that controlled his loca-
"'tion of the surface area, and the patentee under that
"'act takes a fee simple title to the lode, to the full extent
"'located and claimed under said Act.'"

Now it does seem to me, considering the great authority that was behind the Eureka case, that it took a very bold judge to refuse that instruction. It was certainly in harmony with the language that I have read to your Honor from the Eureka case upon this particular topic. That refusal worked momentous consequences. The Supreme Court of the United States proceeds to say:

"Both parties agree in the general rule that the owner
"of a mining right in a lode or vein cannot follow the
"course of the vein beyond the end lines of his location
"extended perpendicularly downwards, but that he may
"follow the dip to an indefinite distance outside of his
"side lines. This is undoubtedly the general rule of
"miners' law, and the true construction of the Act of
"Congress. The language of the Act of 1866, 14 stat. at
"L. 251, in relation to 'a vein or lode' is, 'that no loca-
"'tion hereafter made shall exceed 200 feet in length
"'*along the vein* for each locator, with an additional
"'claim for discovery to the discoverer of the lode, with
"'the right to follow such vein *to any depth*.'"—my emphasis is where the italics are put by the Supreme Court of the United States—"'*to any depth* with *all its*
"'*dips, variations and angles*, together with a reasonable
"'quantity of surface for the convenient working of the
"'same as fixed by the local rules,' etc. The Act of 1872,
"17 stat. at L., 91, is more explicit in its terms:"

In order to show *how* it "is more explicit in its terms," I will read from the two statutes, with your Honor's permission. The first statute, the statute of 1866, says:

"That no location hereafter made shall exceed 200 feet "in length along the vein for each locator, with an addi- "tional claim for discovery to the discoverer of the lode, "with the right to follow such vein," that is, the 200 feet of the vein, necessarily, "to any depth."

The Act of 1872 says:

"A mining claim located after the 10th day of May, "1872, whether located by one or more persons may "equal but shall not exceed 1500 feet in length along the "vein or lode; but no location of a mining claim shall be "made until the discovery of the vein or lode within "the limits of the claim located."

Manifestly this is not the language in which this statute is more explicit than that of 1866, because so far the Act of 1866 is a little bit more particular than the Act of 1872. The Act of 1872 thus far does not say anything about taking the vein to any depth except by inference. It says a mining claim "may equal, but shall "not exceed, 1500 feet in length along the vein or lode." The act of 1866 says: "No location hereafter made shall "exceed 200 feet in length along the vein for each locator "* * * with the right to follow such vein to any "depth."

Certainly it is more explicit thus far than the Act of May 10, 1872. But the same section of the Act of May "10, 1872, closes with the sentence: "*The end lines of* "*each claim shall be parallel to each other.*"

I submit, if your Honor please, that though this had been implied and was necessarily implied by the Act of 1866, the history of the matter is, that the Act of 1866, because it did not furnish a clear definition as to end lines, led to interminable dissensions, just as we have the conditions here in the case at bar. The Kennedy Company would have claimed its end lines at right angles to the general course of the lode within its boundaries, and the Argonaut Company would have claimed its bounding planes at right angles to the general course of the vein within its boundaries, and thus these disputes arose interminably. The dispute here would be over this triangular piece in here (showing with hands as on Diagram E').

These disputes being interminable, the statute of 1872 was passed declaring the meaning of the statute of 1866, when it says:

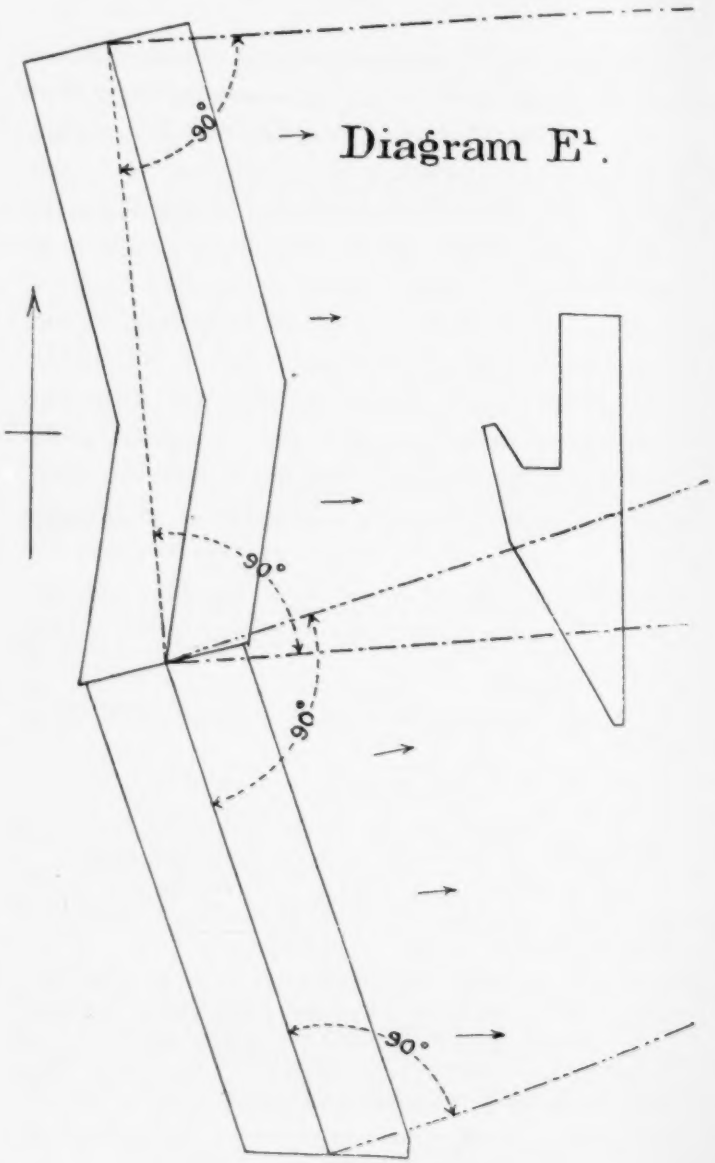
"The end lines of each claim shall be parallel to each other."

And this, as I shall proceed to show your Honor, is held by the later decisions to mean that the end lines *of the surface locations* shall be parallel to each other.

I now proceed with the decision of the Court in the Flagstaff case:

"The Act of 1872, 17 stat. at L. 91, is more explicit in "its terms; BUT THE INTENT IS UNDOUBTEDLY "THE SAME AS IT RESPECTS END LINES AND "SIDE LINES AND THE RIGHT TO FOLLOW THE "DIP OUTSIDE OF THE LATTER."

There is the whole mining law in one sentence.


→ Diagram E¹.
90°
90°
90°
90°

"We think that the intent of both statutes "is that mining locations on lodes or veins shall "be made thereon lengthwise in the general direc- "tion of such veins or lodes on the surface of "the earth where they are discoverable; and that the "end lines are to cross the lode and extend per- "pendicularly downwards and to be continued in "their own direction either way horizontally; and that "the right to follow the dip outside of the side lines is "based on the hypothesis that the direction of these lines "corresponds substantially with the course of the lode or "vein at its apex on or near the surface. It was not the "intent of the law to allow a person to make his location "cross-wise of a vein so that the side lines shall cross it, "and thereby give him the right to follow the strike of "the vein outside of his side lines. That would subvert "the whole system sought to be established by the law. If "he does locate his claim in that way, his rights must be "subordinated to the rights of those who have properly "located on the lode. Their right to follow the dip out- "side of their side lines cannot be interfered with by him. "His right to the lode only extends to so much of the "lode as his claim covers. If he has located cross-wise "of the lode and his claim is only 100 feet wide, that 100 "feet is all he has a right to. This we consider to be the "law as to locations on lodes or veins.

"The location of the plaintiffs in error is thus laid "across the Titus lode, that is to say, across the course of "its apex at or near the surface; and the side lines of the "location are really the end lines of their claim, consid- "ering the direction or course of the lode at the surface.

"As the law stands, we think that the right to follow "the dip of the vein is bounded by the end lines of the "claim, properly so called; which lines are those which "are cross-wise of the general course of the vein on the "surface. The Spanish mining law confined the owner "of a mine to perpendicular lines on every side, but gave "him greater or less width according to the dip of the "vein. See Rockwell, pages 56 and 58, and pages 274

"and 275. But our laws have attempted to establish "A RULE BY WHICH EACH CLAIM SHALL BE SO "MANY FEET OF THE VEIN LENGTHWISE OF "ITS COURSE TO ANY DEPTH BELOW THE SUR-"FACE, ALTHOUGH LATERALLY ITS INCLINA-"TION SHALL CARRY IT EVER SO FAR FROM A "PERPENDICULAR. This rule the Court below strove "to carry out, and all its rulings seem to have been in "accordance with it."

Always and everywhere throughout these decisions, your Honor will find the doctrine of parallelism.

Less than two years after the Eureka case was decided, we find one of its main propositions overruled by the Supreme Court of the United States. The Eureka case says that the ground located in connection with the lode does not bound the extent of the miner's right. Within less than two years thereafter, the Flagstaff case says that it does bound the extent of the miner's right. And the Flagstaff case has been followed by all the later decisions where it says that "OUR LAWS HAVE ATTEMPTED "TO ESTABLISH A RULE BY WHICH EACH "CLAIM SHALL BE SO MANY FEET OF THE VEIN "LENGTHWISE OF ITS COURSE TO ANY DEPTH "BELOW THE SURFACE."

The doctrine of parallelism is certainly set forth clearly in the Flagstaff case by this very language, and the decision in this case was quoted with approval almost entire by the Supreme Court of the United States in its latest great mining decision, Mr. Lindley's Providence case. So the doctrines of the Flagstaff case are the law of mining to-day. They are the last expression of the Supreme

Court of the United States on the subject, namely, the land located does bound the extent of the miner's right, and parallelism is its basic rule.

**The Eureka Case in the Supreme Court.**

It was after the Flagstaff decision was announced, however, that the Supreme Court of the United States took up and decided the Eureka case. Now what is the law announced by that Court in the Eureka case as to end lines? In Richmond v. Eureka, 103 U. S. 839, after discussing the compromise line upon which so much stress has been laid, the Court says:

"This disposes of the case. The Richmond Company "is in no condition to dispute the validity of the Eureka's "patents for the At Last and the Margaret because the "end lines of the surveys are not parallel; as it has "agreed with the Eureka for a consideration not to work "in the limestone to the south and east of the compro- "mise line. Upon the face of the patents"—

—and, if your Honor please, the Margaret and the At Last were both patented under the law of 1872. There is nothing in the patents about the law of 1866. And, if it is any comfort to Mr. Lindley, I will state that, so far as the patents show, the locations were made and perfected and patented under the law of 1872. The Court goes on to say:

"Upon the face of the patents the United States has "granted the Eureka the right to all veins, lodes, and "deposits the tops or apexes of which lie on the inside of "its surveys as patented, throughout their entire depth

"and wherever they may go, provided it keeps itself "within the end lines of the surveys. The finding that "the ground in dispute is within the end lines and that "the apex is within the surface lines, settles the rights "of the parties between themselves as well under their "patents as under their compromise agreement."

Here, as in the Court below, the Court does not undertake to differentiate between locations made under the Act of 1866 and locations made under the Act of 1872. It simply says, in effect, that "the end lines of the sur-"veys" are the controlling feature. In the Court below the judges were careful to mark the end lines through the end points of the locations, to draw parallel bounding planes through the end points of the locations, *regardless of the end lines of the surveys.* But part of the language used here by the Supreme Court would seem to convey the meaning that the end lines of the surface locations are held to control—that the bounding planes are to be ascertained by extending the end lines of the surface locations. It is clear upon an examination of this decision that the only portion of the decision of the Court below as to end lines which was directly and certainly sustained, is that part which says:

"The provision of the statute of 1872, requiring the lines of each claim to be parallel to each other, is merely directory, and no consequence is attached to a deviation from its direction."

Upon that proposition the decision by the Supreme Court followed the Court below, but there is something else. So far as the results of this discussion are con-

cerned, probably it makes no difference whether the Supreme Court meant that the end lines of the surface locations decided the location of the bounding planes, or whether it meant that the bounding planes were to be drawn down through the end points and at right angles to the general course of the lode. It is no particular matter, because of the subsequent decisions of that Court. But it is interesting to know, and it may be important, that the same justice who wrote the opinion of the Supreme Court in the Eureka case, also wrote the dissenting opinion in the Elgin case; and we may therefore very properly look to the Elgin case and to his dissenting opinion there expressed, to determine what was the real meaning of the language used in the Eureka case. I think that is fair reasoning.

I read the dissenting opinion of Chief Justice Waite in the Elgin case, 118 U. S. 209:

"I cannot agree to this judgment. In my opinion the "end lines of a mining location are to be projected paral- "lel to each other and cross-wise of the general course of "the vein, within the surface limits of the location, and "whenever the top or apex of the vein is found within the "surface lines extended vertically downwards, the vein "may be followed outside of the vertical side lines. The "end lines are not necessarily those which are marked "on the map as such, but they may be projected at the "extreme points where the apex leaves the location as "marked on the surface."

This is without change the doctrine of the Eureka case in the Circuit Court, and it is a fair inference, considering that is is by the same Justice, Mr. Chief Justice Waite,

who wrote the prevailing opinion of the Supreme Court in the Eureka case, that it is what was intended by the language used by the Supreme Court in the Eureka case on the same subject.

To my own mind there is no doubt about it, but there is, as I said before, a portion of the language which might be taken to mean that the end lines of the survey, that is, of the surface location, were what should be held as controlling.

The Elgin case was decided April 26, 1886, about five years after the decision of the Supreme Court in the Eureka case, and it is certainly not a violent presumption that Mr. Justice Waite entertained the same opinion during the short period of five years.

At any rate, the Supreme Court in the Eureka case upheld the doctrine that the statute of 1872, when it says "the end lines of each claim shall be parallel to each "other, is merely directory, and no consequence is at- "tached to a deviation from its direction."

**The Elgin Case.**

We come now directly to the discussion of the body of the Elgin case. I don't know of any other or better presentation of this case than the diagram found in Mr. Lindley's book, and as he has kindly allowed me to use my "post-mortem argument," I will refer to his book. (Showing diagram similar to Diagram J.)

MR. LINDLEY. After the adjournment, I will bring you, if you wish it, large maps of the Argentine and the Elgin cases.

# Diagram J.


Surv. No. 490
GILT EDGE
(Disputed Ground)
STONE
Outcrop
Center Line of
Apex and
Surv. No. 217
North End Line
Direction of Dip
Direction of Strike
South End Line
Strike of Lode
1
2
3
4
5
6
7
8
9
10
11
12
13
14

MR. WRIGHT. Our view is, if your Honor please, that the mining law, as evidenced by the decisions, has steadily progressed from the time of the decision in the Eureka case. The first great step was taken by the decision in the Flagstaff case. The next step was taken by the decision in the Elgin case, the case of Iron Silver Mining Co. v. Elgin Mining & Smelting Company, 118 U. S. 196.

As I stated yesterday, the question in this case was brought up by the introduction of evidence by the owners of the Stone claim, showing or tending to show that the vein found within the Stone claim extended on its dip underneath the surface of the Gilt Edge claim, to a point where the owners of the Gilt Edge claim were taking out the ores in dispute. The patent to the Stone claim nominally granted the extra-lateral right, and the testimony was objected to by the owners of the Gilt Edge claim upon the ground that that portion of the Stone patent was void, in the same manner as we have raised our objections here; and the decision of the Court upheld that proposition, that there was no extra-lateral right although it was nominally granted, and that therefore the owners of the Stone claim could not pursue their vein out from under their surface and into and under the surface of the Gilt Edge claim.

After quoting Section 3 of the Act of 1872, which is the same as Sec. 2322 of the Revised Statutes, the Court says:

"This section appears sufficiently clear on its face. "There is no patent or latent ambiguity in it. The lo- "cators have the exclusive right of possession and en- "joyment of 'all the surface included within the lines

"'of their locations' and the location, by another sec-
"tion, must be distinctly marked on the ground, so that
"its boundaries can be readily traced. . R. S. 2324.
"They have also the exclusive right of possession and
"enjoyment 'of all veins, lodes and ledges throughout
"'their entire depth, the top or apex of which lies inside
"'of such surface lines extended downward vertically,
"'although such veins, lodes or ledges may so far depart
"'from a perpendicular in their course downward as to
"'extend outside the vertical side lines of said surface
"'locations.' The surface side lines extended downward
"vertically determine the extent of the claim, except
"when in its descent the vein passes outside of them and
"the outside portions are to lie between vertical planes
"drawn downward through the end lines. This means
"the end lines of the surface location, for all locations
"are measured on the surface."

This claim was located, as heretofore stated, under the Act of 1872.

But, if your Honor please, this is the same judge who wrote the opinion of the Circuit Court in the Eureka case, saying there that the law of 1872 requiring parallelism of the end lines of surface locations was merely directory and no consequence could attach to a deviation from its direction, and he here in the Elgin case says:

"THE SURFACE SIDE LINES EXTENDED DOWN-
"WARD VERTICALLY DETERMINE THE EXTENT
"OF THE CLAIM, EXCEPT WHEN IN ITS DESCENT
"THE VEIN PASSES OUTSIDE OF THEM, AND THE
"OUTSIDE PORTIONS ARE TO LIE BETWEEN
"VERTICAL PLANES DRAWN DOWNWARD
"THROUGH THE END LINES. THIS MEANS
"THE END LINES OF THE SURFACE LOCATION,
"FOR ALL LOCATIONS ARE MEASURED ON THE
"SURFACE."

## The Elgin Overrules the Eureka Decision

And this is by the same judge who a few years before laid down the doctrine that the two statutes were exactly the same in their meaning in this respect, namely, that under each statute you took the end points of the location and passed your bounding planes through them vertically, that is, at right angles to the general course of the lode. That same judge now says that it is the end lines of the surface location that bound the extra-lateral right and here we have the second inroad made upon the doctrines of the Eureka case. In the house of its own friends it is overthrown and by the very judge who wrote the decision.

MR. LINDLEY. Is it not Judge Field who wrote in the same decision that under that state of facts—that under the act of 1866 the end lines of locations were not required to be parallel?

MR. WRIGHT. I will come to that presently, Judge, if you will exercise a little patience, and I will answer you fully and I hope to your satisfaction.

The Court goes on to say as follows:

"The difficulty arising from the section grows out of "its application to claims where the course of the vein is "so variant from a straight line that the end lines of the "surface location are not parallel, or, if so, are not at "right angles to the course of the vein. This difficulty "must often occur where the lines of the surface location "are made to control the direction of the vertical planes. "The remedy must be found, until the statute is changed, "in carefully making the location, and in postponing the "marking of its boundaries until explorations can be

"made to ascertain, as near as possible, the course and "direction of the vein. In Colorado the statute allows "for this purpose sixty days after notice of the discovery "of the lode. Then the location must be distinctly "marked on the ground, and thirty days thereafter are "given for the preparation of the proper certificate of "location to be recorded. Erhardt v. Boaro, 113 U. S. "527, 533. Even then, with all the care possible, the end "lines marked on the surface will often vary greatly from "a right angle to the true course of the vein. But what-"ever inconvenience or hardship may thus happen, it is "better that the boundary planes should be definitely de-"termined by the lines of the surface location, than that "they should be subject to perpetual readjustment "according to subterranean developments made by mine "workings. Such readjustment at every discovery of a "change in the course of the vein would create great un-"certainty in titles to mining claims. The rule, whatever "hardship it may work in particular cases, should be set-"tled, and thus prevent, as far as practicable, such uncer-"tainty.

"If the first locator will not or cannot make the explo-"rations necessary to ascertain the true course of the "vein, and draws his end lines ignorantly, he must bear "the consequences. He can only assert a lateral right to "so much of his vein as lies between vertical planes "drawn through those lines. Junior locators will not be "prejudiced thereby, though subsequent explorations "may show that he erred in his location."

The Court further says, later on:

"This view of the controlling effect of the end lines "of the surface location is also sustained by the decision "of this Court in the Flagstaff case, Mining Company vs. "Tarbet, 98 U. S. 463. There the court said that, 'the "'most practicable rule is to regard the course of the "'vein as that which is indicated by surface outcrop or "'surface explorations and workings.' And that 'it is

"'on this line that claims will naturally be laid what-
"'ever be the character of the surface, whether level or
"'inclined,' and that the end lines of the claim, properly
"so called, 'are those which are cross-wise of the general
"'course of the vein on the surface.' The Court sug-
"gested that the law might be imperfect in this respect,
"and that perhaps the true course of the vein should
"correspond with its strike or the line of a level run
"through it, but it added that this 'can rarely be ascer-
"'tained until considerable work has been done and
"'after claims and locations have become fixed.'"

And so the Eureka case crumbles and crumbles.

MR. MCGEE. Will you permit me to ask you a question? The Elgin case, as I understand it, was a decision on a location made under the act of 1872.

MR. WRIGHT. Yes.

MR. MCGEE. The act of 1872 provided that the end lines of locations must be parallel, and the Elgin case decided that in locations made under that act extra-lateral rights attached?

MR. WRIGHT. Yes.

MR. MCGEE. Now, did the Elgin case say anything about the necessity of parallel end lines under the act of 1866?

MR. WRIGHT. I have promised to answer Judge Lindley fully on that matter.

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*(At this point a recess was taken until 2 o'clock in the afternoon of the same day, when Mr. Wright resumed his argument as follows):*

Now, if your Honor please, this diagram which Judge Lindley has kindly lent me, pretty well illustrates the Elgin case. (Showing diagram similar to Diagram J.)

Your Honor will note that the lode passes into the claim through this line (showing) which is marked as the "North End Line," then follows this tortuous course around the rim of the gulch, and out of this side line (showing line from 6 to 7). This line from 5 to 6 (showing) was marked on the survey for the patent, as an end line, and probably, as the Court remarked, for no other reason than that it was in point of fact parallel to the line from 1 to 14. But, inasmuch as the lode does not pass through it, the Court held that it does not perform any of the functions of an end line, and that therefore it is not an end line, the two end lines, properly so called, being the line from 1 to 14 and the line from 6 to 7, marked upon this diagram as they are marked, I think, on the plat in the Supreme Court report. The ore in dispute was off in this direction (showing) under this Gilt Edge claim. But I have already discussed this case quite fully, so it is not necessary to make any very full remarks upon it, except to read the conclusions of the Court.

**Parallel Surface End Lines Necessary.**

(Reads) "We are, therefore, of opinion that the objection that by reason of the surface form of the Stone claim the defendant could not follow the lode existing therein in its downward course beyond the lines of the claim, was well taken to the offered proof. Besides, if the lines marked as end lines on the plat of that claim

" can be regarded as such lines of the location "—that is to say, if this line from 1 to 14 and the line from 5 to 6 can be regarded as end lines of the location—" no part " of the Gilt Edge claim falls within vertical planes " drawn down through those lines continued in their own " direction. In either view of the location of the Stone " claim, the rejected proof would have established no de- " fense. The premises in controversy are admitted to be " under the surface lines of the Gilt Edge claim eastward " from the defendant's claim and the plaintiffs were " therefore entitled to recover them."

There are two other propositions in this decision which I desire to quote to your Honor, as they are inseparably connected with this chain of argument as it develops. (Reads)

**The Surface End Lines Control and the Same End Lines Bound all Lodes.**

" The provision of the statute, that the locator is en- " titled throughout their entire depth to all the veins, " lodes or ledges, the top or apex of which lies inside of " the surface lines of his location, tends strongly to show " that THE END LINES MARKED ON THE GROUND " MUST CONTROL. It often happens that the top or " apex of more than one vein lies within such surface " lines, and the veins may have different courses and " dips, yet his right to follow them outside of the side " lines of the location must be bounded by planes drawn " vertically through the same end lines. The planes of " the end lines cannot be drawn at a right angle to the " courses of all the veins, if they are not identical."

This second principle in the Elgin case, is a re-affirmance of the doctrine laid down by one of the rulings in

the Eureka case. It is not necessary for me to repeat it. Your Honor will recall that the Richmond Company claimed special privileges as to the old lode, in other words, as to the particularly located lode, more privileges with regard to that than as to the other lodes included within the surface lines of the location, the titles to which were conferred by the Act of 1872 as to all the claims.

The decision on that particular point in the Eureka case is not found in the decision as reported in the books but only in the bill of exceptions of which Judge Lindley furnished us copies. That part of the decision in the Eureka case held, like the Elgin decision, that the same end lines controlled all lodes. That is one of the principles that has been maintained from the Eureka case until the present time, and it was affirmed again in the Providence case, of which Judge Lindley's map is here.

The north end line of the Providence and the south end line of the Providence (showing as on Diagram S) are held to be the end lines of the claim with reference to all the lodes the apexes of which are found within the surface boundaries of the claim extended vertically down. So that proposition is finally established, as it was affirmed in the Eureka case, repeated in the Elgin case and finally again in the Providence case. Walrath v. Champion, 171 U. S.——.

**The Two Statutes the Same as to Parallelism.**

There is another feature of this case concerning which the gentlemen on the other side desire to be enlightened,

and I shall take pleasure in throwing what light I can upon the subject. Your Honor will bear in mind that it is Judge Field who writes this opinion, and he says:

(Reads from the Elgin case)

"Under the act of 1866 parallelism in the end lines of "a surface location was not required; but where a loca- "tion has been made since the act of 1872, such parallel- "ism is essential to the existence of any right in the lo- "cator or patentee to follow his vein outside of the verti- "cal planes drawn through the side lines. His lateral "right by the statute is confined to such portion of the "vein as lies between such planes drawn through the end "lines and extended in their own direction; that is, be- "tween parallel vertical planes. It can embrace no "other portion."

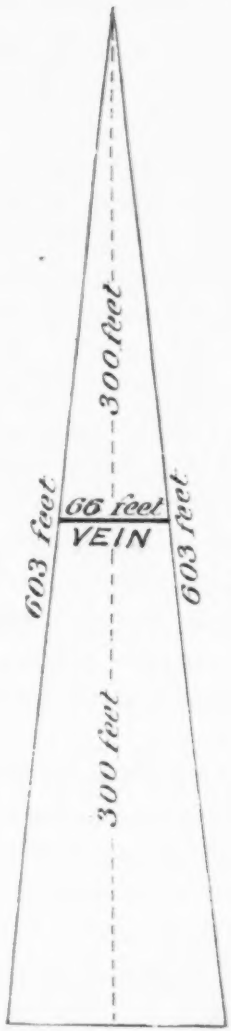
Now the latter portion of this paragraph speaks for itself so plainly that no one can misunderstand it. It must be borne in mind that this was a case arising upon a location made under the act of 1872, the patent following it. I should say that this was what was under discussion. It was clearly laid down as a rule of law and is the law of this case for all purposes, that as to such locations the end lines must be made parallel. I showed your Honor this morning, and I think with reasonable clearness, that every principle of the Eureka case except one has been already swept away. And this reservation, or this language which appears as a reservation, is necessarily *obiter dictum*. I say necessarily because it was not necessary to say this; it was not necessary to a decision of this case.

It has, however, been commented upon by many courts. Those particularly in favor of the old rule which we discussed this morning, seem to think that this is intended as a necessary reservation of that rule, and it has been referred to in a number of decisions in that way. It has been referred to as though the Supreme Court of the United States had meant by this particular language that in cases of locations made prior to May 10, 1872, it is not necessary that the *end lines* shall be parallel in order that the extra-lateral right shall be granted, and as though it stated affirmatively that they would be granted whether the *end lines* were parallel or not. I state that this is the first impression that one receives from an examination of this language. As I said a moment ago, your Honor will find a number of cases, some of them having been already cited by Judge Lindley, where this language has been referred to. I am sure the Judge will pardon me for referring once more to my "post-mortem" pamphlet. On page 31 your Honor will find a few remarks made by myself on a former occasion with reference to this matter, and it contains the result of my investigation of the subject at that time.

In that little argument I said: (Reading from Argument of John M. Wright for defendant in C. C. of U. S., 9th Circuit, N. D. of Calif., on Motions to Remand Causes of Argonaut Mg. Co. v. Kennedy M. & M. Co. to State Court, Nov. 29 and Dec. 6, 1897)

"'Under the Act of 1866, parallelism in the end lines "'of a surface location was not required'—'parallelism "'in the end lines of a surface location,' it says.

# Diagram L.



"If your Honor please, the Court might just as well say "the same thing of the law of 1872, at even this stage of "the decisions. Suppose we insert 1872 in the place of "1866 and make the language read:

"'Under the act of 1872, parallelism in the end lines "'of a surface location is not required.'

"That is absolutely true under all the decisions. The "land will be granted. A surface location will be grant- "ed under either Act, whether the end lines are parallel "or not. In the case of Montana Company v. Clark, 42 "Fed. 626, the land was in the shape of an isosceles tri- "angle and yet no one questioned the validity of the title "to the land."

If your Honor will turn to Diagram 4 on the next page, page 32, you will find an illustration of the isosceles triangle case which I have just referred to (showing diagram same as Diagram L). That is as near as I could make a correct diagram from the language of the decision.

In that case the Court very properly held that there was no extra-lateral right because the end lines were not parallel and the location was made under the Act of 1872. *But no one thought of questioning, as I quoted a moment ago, the right of the owner to the surface and to everything therein contained.*

My comment at that time went a little further and I said: (reading from page 31 of the pamphlet)

"Does an extra-lateral right attach, is always the im- "portant question, whatever may be the shape of the sur- "face claim.

"This language, if your Honor please, is very cau- "tiously used. It is, I think, tantamount to saying:

"'We refuse at this stage to decide whether there is "'any difference between a claim under the law of 1866 "'and a claim located under the law of 1872.'

"The fact actually stated by the Court is equally true "in both cases."

It is not necessary for me to repeat the language of the decision again.

Now, lest your Honor should think that I have thus put a strained construction upon this language for the purposes of the case at bar, I will call your Honor's attention to the very last sentence of the very last paragraph of the very last mining decision given forth by the Supreme Court of the United States. Your Honor will find it on page 935 of the pamphlet handed you yesterday, (No. 16 for Oct. Term, 1897, Advance Sheets, L. C. P. Edition of U. S. Supreme Court reports) containing the Providence case, where this very language of the Supreme Court in the Elgin case is commented upon. The Supreme Court is speaking by Mr. Justice McKenna. (reading)

"IT MAY BE THAT THERE WAS LIBERTY OF "SURFACE FORM UNDER THAT ACT, BUT THE "LAW STRICTLY CONFINED THE RIGHT ON THE "VEIN BELOW THE SURFACE. THERE IS LIB- "ERTY OF SURFACE FORM UNDER THE ACT OF "1872. IT WAS EXERCISED IN IRON SILVER MIN- "ING CO. V. ELGIN MINING & S. CO. *SUPRA*, IN "THE FORM OF A HORSE-SHOE; IN MONTANA CO. "LIMITED V. CLARK, 42 FED. REP. 626, IN THE "FORM OF AN ISOSCELES TRIANGLE."

This is the latest utterance of the Supreme Court of the United States upon this subject. It was placed in this decision, as I conceive the matter, for the express pur-

pose of explaining away that first sentence quoted from the Elgin case.

I should not say "explaining away;" I do not mean that, but to explain the real meaning of it, and to show that, as to both classes of locations, the Supreme Court of the United States has determined to put them upon the same level and to go back, if you please, to first principles, and to hold every man to parallel end lines according to the rules of the miners.

But when and where was any other rule ever followed? Where is the decision showing that any one was ever allowed to go outside his surface between divergent end lines in the manner claimed here for the Pioneer? Whence arose the desire to do so? It arose because certain old locators found that they had made mistakes in their locations. Hence arose this stress of determination to make a new rule, something unheard of among the rules of miners, so that men might extend their possessions underneath the surface of the earth until, in the language of Judge Field, they would "oust all of their "neighbors and take the whole ledge." It is the doctrine of greed. It has no foundation in the law.

**Development of the Mining Law.**

The next case which I shall present for the consideration of your Honor, is the case of Lakin v. Dolly, which opens up a different branch of this discussion. I am taking up the whole matter in historical sequence, so as to show the development of the mining law from year to

year, and the next important case is the case of Lakin v. Dolly, 53 Fed. 333. But before taking up this case, it will be necessary to go into some few preliminaries, and I wish to read Section 9 of the Act of 1872, which is as follows:

**Reservations of the Act of 1872.**

"Sec. 9. That sections 1, 2, 3, 4, and 6 of an act entitled "'An Act granting the right of way to ditch and canal "'owners over the public lands and for other purposes,' "approved July 26th, 1866, are hereby repealed, but such "repeal shall not affect existing rights. Applications for "patents for mining claims now pending may be pros- "ecuted to a final decision in the General Land Office; "but in such cases where adverse rights are not affected "thereby, patents may issue in pursuance of the provi- "sions of this act; and all patents for mining claims "heretofore issued under the act of July 26th, 1866, shall "convey all the rights and privileges conferred by this "act, where no adverse rights exist at the time of the "passage of this Act."

And the last clause of section 16 of the act of 1872, which reads as follows:

"*Provided*, that nothing contained in this act shall be "construed to impair, in any way, rights or interests in "mining property acquired under existing laws."

Now it is claimed by many that it is intended by these provisions to preserve *all* rights intact, whether of location or under patent, as they existed at the time the law of 1872 was passed. It is my intention to read from a few cases for the purpose of showing how this matter is construed by the Courts, as to what rights are main-

tained and what are not, as to what rights are considered vested rights and what are not. I read from the case of Gwillim v. Donellan, 115 U. S. 45, where the language is:

"A valid and subsisting location of mineral lands made "and kept up in accordance with the provisions of the "statutes of the United States, has the effect of a grant "by the United States of the right of present and exclu- "sive possession of the lands located."

This language is very strong, if your Honor please, and it would seem that a location thus made so as to have the "effect of a grant," would establish one of those vested rights which are to be protected under the Act of 1872. We will make our inquiries for the purpose of ascertaining whether this is true or not.

**The Patents Now Before the Court.**

And it is time, your Honor, to pay some little attention to the contents of these patents now before the Court. I may say that they are precisely the same in form except in one respect. Your Honor is familiar with the fact that patents which were issued under the law of 1866, invariably expressed or defined or described the lode that was granted, by metes and bounds. This was required by the statute itself, which stated in terms that no more than one lode could be granted, "which shall be expressed in "the patent issued."

Now, in the case of the Kennedy patent to the Kennedy Mine, the lode is defined as this lode line is laid down here, a line laid down by the field notes just exactly as it is here (showing as on Diagram Q).

In the case of the Pioneer patent, the lode is not specifically described except by reference to its south end point and its north end point. I think the description of the Kennedy lode begins at this point (showing bend in Kennedy vein) and goes on to this point (showing south end center) then comes back to this point (showing bend in vein) and goes to this point (showing north end center). Except in that respect, as I said before, these patents are the same in form. The patent of the Pioneer mine begins as follows:

**The Pioneer Patent.**

"Whereas, in pursuance of the Act of Congress ap-
"proved July 26th, 1866, entitled 'An Act granting the
"'right of way to ditch and canal owners over the public
"'lands, and for other purposes,' the Act amendatory
"thereof approved July 9th, 1870, and the act approved
"May 10th, 1872, entitled 'An Act to promote the devel-
"'opment of the mining resources of the United States,'
"there have been deposited in the General Land Office of
"the United States the plat and field notes of survey of
"the claim of the Pioneer Gold and Silver Mining Com-
"pany upon the Pioneer Quartz lode bearing gold, accom-
"panied by the certificate of the Register of the Land
"Office at Sacramento, in the State of California, whereby
"it appears that in pursuance of said acts of Congress,
"the Pioneer Gold & Silver Mining Company did, on the
"23rd day of February, A. D. 1872, enter and pay for said
"mining claim or premises, being Mineral Entry No. 63,
"in the series of said office, designated by the Surveyor
"General as Lot No. Forty eight (48) embracing a portion
"of the north-east quarter of section Twenty (20) in
"Township Six North of Range eleven East Mount
"Diablo Mer. in the Jackson Mining District, in the

"County of Amador, and State of California, in the Dis-
"trict of lands subject to sale at Sacramento embracing
"twenty two and twenty two hundredths (22.22) acres of
"land, more or less, and according to the returns on file
"in the General Land Office, bounded, described and plat-
"ted as follows, with magnetic variation at seventeen
"(17) degrees east, to wit:" Then follows the description.

**The Four Classes of Patents.**

This description of the procedure under which this patent was obtained, brings to mind at once that there are in existence four classes of mining patents. The first class includes those that were actually patented before the passage of the law of May 10, 1872, that is to say, those cases where the patent was actually issued. The second class is the class within which these two patents fall, namely, those where the application was made and a large portion of the proceedings had been carried on—in these cases the proceedings had gone so far that the land had been entered and paid for before the passage of the Act of May 10, 1872. The third class is of those cases where the location was made but no application was made in the Land Office nor any other step taken towards the getting of a patent before the Act of May 10, 1872, was passed. And the fourth class is of those cases where the location itself was made after the passage of the Act of May 10, 1872.

**The Applicant Had His Option to Patent Under Either Act.**

I have read to your Honor the statute on the subject of procuring patents but there are one or two paragraphs

I think I ought to repeat: (Reading from Sec. 9, Act of May 10, 1872)

" Applications for patents for mining claims now pend-
" ing may be prosecuted to a final decision in the General
" Land Office; but in such cases where adverse rights are
" not affected thereby, patents may issue in pursuance of
" the provisions of this Act."

Now it becomes us to inquire what was done in this particular case before the Court.

Your Honor will notice *that this statute does not provide that a patent may issue under the provisions of both acts. The patent may issue under the provisions of this act or the application may be pursued to its conclusion under the Act of 1866.* That is the express provision of the statute, and if this patent shows by internal evidence that it was issued under the Act of May 10, 1872, we say that then the lands granted by this patent are subject to all the restrictions—that the owner of this patent is entitled to all the privileges and subject as well from necessity to all the restrictions—of the act of May 10, 1872.

Your Honor will here note that we are not dealing with a patent issued under the Act of 1866. These proceedings were pending when the Act of 1872 was passed, and the applicant had his option expressly granted him by the section I have read, to proceed to patent under the Act of 1866, if, in his judgment, he would acquire greater rights thereby; or, if no adverse claims existed, he might proceed to patent under the provisions of this Act of May 10, 1872.

**Review of the Pioneer Patent, Continued.**

The next paragraph of the patent describes the segment of land granted; the next defines the mill site, this Pioneer mill site (showing as on Diagram Q) and then follows the grant, or attempted grant, of the lode, which I have already read to your Honor. I think I had better read this:

"Now Know Ye, that the United States of America in "consideration of the premises and in conformity with "the said Acts of Congress, have given and granted, and "by these presents do give and grant, unto the said "Pioneer Gold and Silver Mining Company and to their "successors and assigns the said mining premises here-"inbefore described as Lot Number forty-eight (48) em-"bracing a portion of the north-east quarter of Section "twenty (20) in Township Six (6) North of Range eleven "(11) East, Mount Diablo Meridian, with the exclusive "right of possession and enjoyment of all the land in-"cluded within the exterior lines of said survey, not "herein expressly excepted from these presents, and of "1589 94-100 linear feet of the said Pioneer quartz vein, "lode, ledge or deposit, as hereinbefore described "throughout its entire depth, although it may enter the "land adjoining,"—

MR. LINDLEY. (Interrupting.) Does not the patent itself say that it was issued under the Act of 1866, as well as under the Act of 1872?

MR. WRIGHT. Yes, sir; I have already read that portion of the patent.

**One Statute or the Other Must Control.**

MR. LINDLEY. Excuse me, I did not hear it.

MR. WRIGHT. I read it as distinctly as I could and it

will be found in the minutes. But what I say is that the statute allows a man to go to patent under the Act of 1866 where his application was pending when the statute of 1872 was passed. But he had his option to patent under the Law of 1872. He did not have the option to take all the rights and privileges under the Act of 1866, whatever they might be, subject to none of the restrictions of the Act of 1872, and to take all the rights and privileges under the Act of 1872, subject to none of the restrictions of the Act of 1866, which is what the gentlemen asks in this Court to-day. There is no such thing in the law.

**The Pioneer Patent Issued Under the Act of 1872.**

The internal evidence of the patent itself will show what was granted, the evidence shown by the patent itself is what we must go by. But I will continue reading from the patent: (reading)

" and of all the veins, lodes, ledges or deposits through-
" out their entire depth, the tops or apexes of which lie
" inside the exterior boundary lines of said survey at the
" surface extended downward vertically, although such
" veins, lodes, ledges or deposits in their downward
" course may so far depart from a perpendicular as to
" extend outside the vertical side lines of said survey."

Here, if your Honor please, is one of the distinguishing characteristics of patents issued under the law of May 10, 1872. It is a distinct grant by the patent itself of these lodes other than the principal lode located.

(Continues reading from the patent)

" Provided, that the right of possession hereby granted
" to such outside parts of said veins, lodes, ledges or de-

"posits, shall be confined to such portions thereof as lie "between vertical planes drawn downward through the "end lines of said survey at the surface so continued in "their own direction that such vertical planes will inter- "sect such exterior parts of said veins, lodes, ledges or "deposits."

Here we have another of the distinguishing features of a grant under the Act of May 10, 1872. These rights must be exercised between the end lines of the survey at the surface, but the ownership of these additional lodes is one of the privileges that is granted under the Act of 1872. Is it possible that gentlemen can come into a Court of justice and say that they are entitled to all the privileges under an act and are not to be subjected to any one of its restrictions? The proposition is absurd upon the face of it. I read further:

"And provided, further, that nothing in this convey- "ance shall authorize the grantees herein, their succes- "sors or assigns, to enter upon the surface of a mining "claim owned or possessed by another:

"To have and to hold said mining premises, together "with all the rights, privileges, immunities and ap- "purtenances of whatsoever nature thereunto belong- "ing, unto the said Pioneer Gold and Silver Mining Com- "pany and to their successors and assigns forever, sub- "ject, nevertheless, to the following conditions and stipu- "lations:

"First—That the grant hereby made is restricted to "the land hereinbefore described as Lot No. forty eight "(48) with 1589 $^{94}/_{100}$ linear feet of the Pioneer Quartz "vein, lode, ledge or deposit throughout its entire depth "as aforesaid, together with all other veins, lodes, ledges "or deposits throughout their entire depth as aforesaid "the tops or apexes of which lie inside of the exterior

"lines of said survey, and to which no valid adverse "claim existed on the 10th day of May, 1872."

Here is an attempt by the officers of the Land Office to grant a segment of the lode or rather segments of several lodes, without defining the segments. But they have restricted this grant in terms to 1589 $^{94}/_{100}$ linear feet. I admit that it was made under the supposition that a rule such as the rule laid down by Judge Field in the Eureka case would prevail, namely, that the provisions of the Act of May 10, 1872, as to parallelism of end lines was merely directory, and that no consequence would attach to a deviation from its direction, and that the end lines would be drawn down from the end points.

But the patent itself demands parallelism throughout. Throughout this discussion, through all the cases, it is parallelism, parallelism from beginning to end. Does plaintiff mean to say that it has the option to go north or to go south or to go in the middle and pick its land? Why, this Act of May 10, 1872, was passed for the very purpose of allowing every man to define his right so that thereafter there could be no question as to what he owned, and so that all these altercations as to whose claim was located first, and about end lines, should be done away with. Yet here we are asked at this late day for something that is not granted by any statute under any ruling. I read further:

"Second—That the premises hereby conveyed with the "exception of the surface, may be entered by the propri- "etor of any other vein, lode, ledge or deposit, the top "or apex of which lies outside of the exterior limits of

"said survey should the same in its downward course be "found to penetrate, intersect, extend into, or underlie "the premises hereby granted, for the purpose of extract- "ing and removing the ore from such other vein, lode, "ledge or deposit.

"Third—That the premises hereby conveyed shall be "held subject to any vested and accrued water rights for "mining, agricultural, manufacturing or other purposes, "and rights to ditches and reservoirs used in connection "with such water rights as may be recognized and "acknowledged by the local laws, customs and decisions "of courts."

Then follows a recitation in substance of the condition contained in section 5 of the Act of 1866, which has never been repealed:

"Fourth—That in the absence of necessary legislation "by Congress, the legislature of California may provide "rules for working the mining claim or premises hereby "granted, involving easements, drainage, and other "necessary means to its complete development."

Now, as I said to your Honor, the internal evidence here is clear and it is beyond peradventure that the Land Department of the United States undertook to issue this patent under the Act of 1872. So far as the recitation in the patent to the effect that it is issued under the Act of 1866 is concerned, it may go to the extent that some of these proceedings took place under the Act of 1866. It is a mere recitation of that fact but the effect of it all is that a part of the proceedings took place under the Act of 1866, but that the patent is granted under the Act of 1872 as provided by section 9 of the Act of 1872. That is the effect of it, and there is no escape from it by any rule of reason.

I shall not ask your Honor to accept my dictum on this point. I shall present decisions of the highest courts, which will nail down and clinch this proposition beyond peradventure.

**The Lakin Cases.**

I now proceed to discuss the case of Lakin v. Dolly. And if this discussion should be lengthened beyond the court's anticipation, I hope your Honor will bear with me. It is necessary in the development of these problems, to follow the history of the mining decisions from the passage of the Act of May 10, 1872, to the present time, and I am simply following the development of the mining law as established and shown by the decisions of the Courts.

As suggested by my associate, the Eureka case was a case of first impression. To-day there is nothing left of it, except the one provision that the same end lines bound all lodes. Everything else has been swept away, as I have shown to your Honor, and to the shreds and tatters and crumbling remains of it, the plaintiff is welcome!

I will not read the statement of facts in this case of Lakin v. Dolly, but the facts shown upon the record were: that the claim was located under the Act of 1866 or, at any rate, prior to May 10, 1872; that the surface land located on one side of the lode was about 50 feet in width and that a very large extent of territory was located on the other side of the lode; and that the whole location passed to patent. I think the first steps in the way of making an application for patent had been taken before

May 10, 1872. The patent itself was issued upon the location as made, with much more than 300 feet of ground on one side of the lode. Here is a diagram in Mr. Lindley's book to which I call your Honor's attention. (showing diagram same as Diagram K).

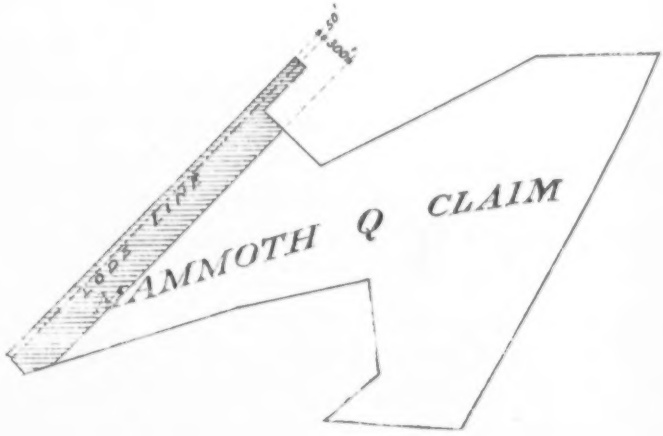
Now, if your Honor please, here was a location which, *as a location*, was perfected prior to the passage of the Act of May 10, 1872. The Land Department passed it to patent and it was therefore to be conclusively presumed that the amount of surface land that was attached to this lode was a proper amount under the rules of miners within the district where the mine was situated.

MR. LINDLEY. Permit me to correct you there, please. The decision in this case was reviewed by Judge Hawley in the North Star case, where it is especially stated that the local rules in evidence before the Court at that time limited the surface to a hundred feet and that the patent was issued in violation of the local rules. I do not want you to make such a statement without my calling your attention to the fact that you are falling into a grievous error.

MR. WRIGHT. Much obliged to you for your fairness, but we will take pains to rectify our error, if we are in error, as we are familiar with the statement of the Judge in the case you refer to.

Now, I say that under all the decisions, it is to be conclusively presumed from this patent that that area was a proper area under the rules of the miners, and Judge Lindley cannot find a case in the books to the contrary.

# Diagram K.



That is one of the questions which the Land Department could rule upon; it is one of the questions which was within its jurisdiction. But let us see how the case develops. There is no need to be in haste about this.

I read from 53 Fed. 337:

"It is claimed by plaintiff that upon the facts of this "case, and under the provision of section 2328 Rev. St. "U. S., the patent must be considered and treated as hav- "ing been issued under the Act of Congress of 1866. IT "IS IMMATERIAL, SO FAR AS THE RESULT OF "THIS DECISION IS CONCERNED, WHETHER THE "PATENT IS CONSTRUED WITH REFERENCE TO "THE ACT OF 1866, OR THE SUBSEQUENT PRO- "VISIONS OF THE REVISED STATUTES, UNDER "AND IN PURSUANCE OF WHICH THE PATENT "PURPORTS TO HAVE BEEN ISSUED; BUT I AM "OF OPINION THAT THE QUESTION AS TO THE "VALIDITY OF THE PATENT DEPENDS UPON "THE CONSTRUCTION TO BE GIVEN TO SECTION "2320, REV. ST. U. S."

Now, Judge Hawley does not say here that this was because the rules of miners only allowed a hundred feet. He says this decision is based on section 2320 of the Revised Statutes of the United States. I read further:

"This section reads as follows:

"'Mining claims upon veins or lodes of quartz or other "'rock in place bearing gold, silver, cinnabar, lead, tin, "'copper or other valuable deposits, heretofore located, "'shall be governed as to length along the vein or lode "'by the customs, regulations, and laws in force at the "'date of their location. A mining claim located after "'the 10th day of May, 1872, whether located by one or "'more persons, may equal, but shall not exceed 1500 "'feet in length along the vein or lode; but no location

" ' of a mining claim shall be made until the discovery of
" ' the vein or lode within the limits of the claim located.
" ' No claim shall extend more than 300 feet on each side
" ' of the middle of the vein at the surface, nor shall any
" ' claim be limited by any mining regulations to less
" ' than 25 feet on each side of the middle of the vein at
" ' the surface, except where adverse rights existing on
" ' the 10th day of May, 1872, render such limitation
" ' necessary. The end lines of each claim shall be paral-
" ' lel to each other.' "

The Court then goes on to say:

" This entire section seems to be clear, definite, and
" certain. It provides that all mining claims upon
" quartz lodes located prior to its passage, should be
" governed as to the length of the claim along the lode,
" ' by the customs, regulations and laws in force at the
" ' date of their location; ' that the claims located after
" May 10, 1872, ' may equal, but shall not exceed, 1500
" ' feet in length along the vein or lode.' So far the sec-
" tion relates solely to the question of the length of the
" lode that may be located. It next takes up the ques-
" tion as to how much surface ground will be allowed to
" the locator of a quartz lode, and says that, ' no claim '—
" evidently meaning all claims, whether coming within
" the first clause relating to claims located prior to the
" passage of this section, or within the second clause, re-
" lating to locations made subsequent thereto—' shall
" ' extend more than 300 feet on each side of the middle
" ' of the vein at the surface.' Having thus expressed
" the extent of the surface ground to which the locator
" may be entitled, it further provides that the amount of
" the surface ground shall not in any case be limited by
" any mining regulations to less than 25 feet on each side
" of the middle of the vein at the surface, except in cer-
" tain contingencies, which have no application to the
" facts of this case. AFTER THE PASSAGE OF THE
" ACT OF WHICH THIS SECTION FORMS A PART,

"IT SEEMS VERY CLEAR, TO MY MIND, THAT THE "LAND DEPARTMENT HAD NO JURISDICTION, "POWER OR AUTHORITY TO ISSUE A PATENT "FOR A QUARTZ LODE TO ANY SURFACE "GROUND EXCEEDING 300 FEET IN WIDTH ON "EACH SIDE OF THE MIDDLE OF THE VEIN OR "LODE, AND THAT ANY PATENT WHICH IS IS-"SUED FOR MORE THAN THAT AMOUNT OF SUR-"FACE GROUND IS ABSOLUTELY NULL AND "VOID AS TO THE EXCESS OVER 300 FEET, AND "CAN BE COLLATERALLY ATTACKED IN A "COURT OF LAW."

If your Honor please, it seems to me that Judge Hawley by this language has saved us a great deal of trouble. He has divided this section, in his discussion, into two parts, the first portion of the paragraph referring to the length of claims, and the second portion referring to the width of claims and containing the important provision that "the end lines of each claim shall be parallel to "each other."

Now, if your Honor please, there are some things that need no explanation, and this is certainly one of them. If the language as to the WIDTH of the claims is universal, how can it by any process of reasoning be contended that the language as to END LINES is not also universal? It is within the same portion of the same paragraph. "This entire section," the Court says, "seems to be clear, "definite and certain."

The Court says, when it takes up the second paragraph: "'No claim'—evidently meaning all claims, "whether coming within the first clause relating to "claims located prior to the passage of this section, or

" within the second clause, relating to locations made " subsequent thereto—' shall extend ',' etc.

This is universal language, the Court says, in effect.

Now, when this paragraph says that no claim shall extend more than three hundred feet and another part of it, the concluding part of it, says, " the end lines of each " claim shall be parallel to each other," I would like to know upon what principle of logic or of reasoning or of common sense, it can be held that that last line does not apply to all claims; certainly, if your Honor please, to all unpatented claims, whether located before or after the passage of the Act of May 10, 1872. I say this is beyond peradventure.

Now if it were true that the owners of locations made prior to May 10, 1872, were protected in all their rights by the Act of May 10, 1872—if that were the meaning of the statute—would a Flagstaff decision be possible, if your Honor please? Certainly not! Now, in the Flagstaff case, those portions of the lode that were located outside of the segment of ground that was located, were considered as much a part of the location as the part within the segment, yet the Supreme Court swept all those portions of the claim away by the Flagstaff case.

And here in Lakin v. Dolly, we come to another development, where extraordinary surface rights were claimed, and the Court held in effect that no matter what your claim may have been when the Act of 1872 was passed, that statute itself cut off your land so that you can have no more than 300 feet on either side of your lode.

Gentlemen may reason, and they may struggle, but these cases are beyond peradventure. The next page in the development of this case was in the 54th Federal.

**Gwillim v. Donellan and Belk v. Meagher.**

When the language in Gwillim v. Donellan was used to the effect that a location is tantamount to a grant, it would appear as though the Court meant that all the rights acquired by means of an act of location were vested rights. But certainly these decisions show that such is not the case. These decisions show that no right becomes vested until the patent is finally passed, and not then when issued against law.

THE COURT. This case of Gwillim v. Donellan is cited to the same effect as Belk v. Meagher, 104 U. S. 279?

MR. WRIGHT. Yes, that is the same general idea.

THE COURT. Of course the point involved in the case of Belk v. Meagher, if I remember the case rightly, was that while the location was still valid, no other locator could get upon it.

MR. WRIGHT. Yes, that is the point of the decision; that decision was rendered in 1881.

**Lakin v. Roberts.**

Now, this case of Lakin v. Dolly came up in the United States Circuit Court of Appeals under the name of Lakin v. Roberts, 54 Fed. 461, before McKenna and Gilbert, Circuit Judges, and Deady, District Judge. Judge McKenna wrote the opinion, and he says:

"Plaintiff's counsel contends that the provision for "the width of claims applies only to subsequent loca- "tions, and that section 2328 of the Revised Statutes re- "serves to plaintiff the provisions of the Act of July 26, "1866. Section 2328 of the Revised Statutes is as fol- lows:

"'Applications for patents for mining claims under "'former laws now pending may be prosecuted to a final "'decision in the General Land Office, but in such cases "'where adverse rights are not affected thereby, patents "'may issue in pursuance of the provision of this "'chapter, and all patents for mining claims upon veins "'or lodes heretofore issued, shall convey all the rights "'and privileges conferred by this chapter where no "'adverse rights existed on the 10th day of May, 1872.'

"It is not contended that plaintiff's interests were so "far vested that by that act Congress had no power to "limit or vary them. We shall assume, therefore,"—

—now, right here is suggested, if your Honor please, the true rule that underlies this whole subject, as I shall show your Honor fully at a later period of this discussion, THAT CONGRESS DID HAVE A RIGHT TO CON- TROL THIS WHOLE MATTER—

"We shall assume, therefore, that CONGRESS HAD "THIS POWER, AND, HAVING IT, WE THINK IT "EXERCISED IT IN THE PROVISIONS WE HAVE "QUOTED. The language of the section of the Revised "Statutes must be confined to preserving the applica- "tion, and of all rights EXCEPT THE SIZE OF THE "CLAIM, LENGTH AND WIDTH OF IT.

"All the provisions of the statutes would not other- "wise be given effect. The Land Department, therefore, "had no power to issue a patent for a greater width of "land than 300 feet, and the patent in this case in excess "of 300 feet is void. Doolan v. Carr, 125 U. S. 624, 8 Sup. "Ct. Rep. 1228, and the other decisions cited in the

"opinion of the learned judge who tried the case in the "Circuit Court."

**The Lakin Cases in the U. S. Supreme Court.**

This decision becomes of paramount importance in the light of its subsequent history. I am sure your Honor will be pleased to read the petition for re-hearing before the Circuit Court of Appeals, as well as the petition presented on behalf of the losing party for a writ of *certiorari* and a writ of error in the Supreme Court of the United States. If I thought counsel could possibly object to this, I should not offer it to the Court.

MR. LINDLEY. We have not the slightest objection.

MR. WRIGHT. I may say to the Court and counsel that, in my opinion, the briefs that were presented in this case are exhaustive as to what constitutes and what do not constitute vested rights within the meaning of the statute of 1872. They are upon the side that is represented by Mr. Lindley in the case at bar, otherwise I would not feel that I had a right to present them. I think I have here all of the briefs. They were prepared by Mr. H. L. Gear, whom we all know as a lawyer who leaves nothing undone that can be done in preparing his cases.

MR. LINDLEY. That was a petition for a writ of *certiorari* and it was denied by the Supreme Court of the United States.

MR. WRIGHT. Yes, and something else was done, I am glad to be able to state for your satisfaction.

If your Honor please, there are three methods of reach-

ing the Supreme Court of the United States; one is by the writ of *certiorari*, which questions the jurisdiction, one is by writ of error and the third is by the ordinary appeal. In this case, as it appears, an application was made for a writ of *certiorari*, and that was denied, and an application was made for a writ of error, and that was denied, and the records of the Supreme Court of the United States show that fact. That case has therefore become the law of the land. The Supreme Court of the United States frequently refuses a writ of *certiorari* where the jurisdiction was properly entertained below, because, as your Honor well knows, the writ of *certiorari* is used, when the matter is properly presented, for the sole purpose of bringing up the question of jurisdiction. But where the right of appeal exists, where the right to a writ of error exists, who ever heard of the Supreme Court of the United States refusing a writ of error, excepting under circumstances where they know that if the writ were brought in they would be compelled immediately to dismiss the writ—because they approve of the law of the case as laid down by the court below?

(See R. S. of U. S., Sec. 999, and Sec. 6 of Chap. 517, Act of Mar. 3, 1891, establishing U. S. Courts of Appeals).

[Mem. The first of these citations was not mentioned at the oral argument and the second was not mentioned in this place.]

I say that this is to-day, according to its history, as the matter now stands upon the records of the Courts, the supreme law of this land. There can be no question

about it, and I am glad to say that it was made the law of the land after the most exhaustive presentation of the case by the other side, so as to leave no doubt as to what was intended.

That being the case, whatever Judge Hawley said or did not say in the North Star case, could not affect the authority of this case as the law of the land. This case was decided under the section of the Revised Statutes referred to, and it will stand until reversed either directly or by clear implication.

My associate asks if I have read to the Court the actual decision in the court of appeals. The decision was this:

"The Land Department therefore had no power to "issue a patent for a greater width of land than three "hundred feet, and the patent in this case in excess of "three hundred feet is void."

MR. MCGEE. The patent was for 250 acres of land wasn't it, in that case?

MR. WRIGHT. I don't know; I know it passed the Land Office, which has jurisdiction in these cases.

MR. LINDLEY. The patent was for 252 acres.

MR. WRIGHT. The patent was in opposition to section 2320 of the Revised Statutes, therefore it was declared void. I don't know whether it was for 5,000 or 250 acres; the principle is the same. It is section 2320 that we are contending for.

This is one of those monumental decisions that stand and throw light upon these new questions.

## Review of the Lakin Cases in the North Star Case.

Now, if your Honor please, in so far as the North Star case is concerned, the Court simply held, in effect, that the Lakin cases did not affect the question of extra-lateral rights in that case, the North Star case.

I read from Carson City v. North Star, 83 Fed. 668:

"It appears from the patent and is shown in the dia-
"gram that the mining ground patented varies in width
"from 650 to 1250 feet, and it is therefore claimed by
"plaintiff in error that the patent is void upon its face,
"and Lakin v. Dolly, 53 Fed. 333, and Lakin v. Roberts,
"4 C. C. A. 438, 54 Fed. 462, are cited and relied upon in
"support of this contention. Every case must be consid-
"ered with reference to its own peculiar facts. The
"Lakin cases did not involve any construction of the law
"appertaining to the extra-lateral rights of the lode pat-
"ented to the Mammoth Gold Mining Company. The
"lode neither in its length or depth was involved. It was
"only the surface ground that was in dispute. The pat-
"ent in those cases embraced two separate mining loca-
"tions and conveyed 4100 feet of a gold bearing quartz
"lode with 252 $^{95}/_{100}$ acres of land. The lode as located
"and fixed on the surface of the ground was in a straight
"line along the northwest boundary of the patented tract
"and was within fifty feet of said line. The surface tract
"covered by the patent, except said fifty feet was on the
"south-east side of said lode and extended about three-
"quarters of a mile therefrom. Under the rules and reg-
"ulations of the Mining District where said lode was
"situated, the locator was entitled to only 100 feet of
"ground on each side of the lode, and under the laws of
"the United States (Rev. St. Sec. 2320) the amount of sur-
"face is restricted to 300 feet. The question there was
"whether by virtue of the surface ground the owner of
"the mining claim could include real estate within the
"surface boundaries situated more than 300 feet distant

"from the lode. Upon the facts the court held that under "the provision of section 2320 Rev. St. U. S., the Land "Department had no jurisdiction, power or authority to "issue a patent to a quartz lode for any surface ground "exceeding 300 feet in width on each side of the middle "of the vein or lode, and that any patent that is issued "for more than that amount of surface ground is abso- "lutely null and void as to the excess over three hundred "feet, and that the patent might be collaterally attacked "in a court of law. *It will thus be seen that there "were no principles of law involved in those cases which "have any application whatever to the case at bar.* In this "case the plaintiff in error does not claim any right "whatever to the surface boundaries of the North Star "claim as patented, and it is a well settled and elemen- "tary principle of law that the possession of this surface "ground by the defendant in error is sufficient evidence "of title as against any one not showing any higher or "better right thereto. Moreover, even if the principles "of the Lakin cases could be considered remotely or "otherwise as having any application to the present case, "still the defendant in error would be entitled to the vein "or lode which was proved and established in this case, "and to the surface ground for three hundred feet on "each side of the center of the lode, and this is all that is "required to give the party the extra rights which are "provided for by the statute."

Now, as your Honor is entirely aware, in the North Star case the end lines converged in the direction of the dip of the lode—

MR. MCGEE. (Interrupting) Why don't you read the next paragraph, Mr. Wright?

MR. WRIGHT. I have read all that refers to this Lakin-Dolly decision.

MR. MCGEE. I don't think that is fair to the Court.

MR. WRIGHT. What is not fair to the Court? Why, Mr. McGee, what are you talking about? I have a right to bring into this discussion only that part of the decision that refers to the question under consideration. (To the Court) But in order to satisfy Mr. McGee, I will read the next paragraph, which by the wildest stretch of the imagination could not be held to have any reference whatever to this particular question. But, before reading it, I wish to comment upon the language that I have just read. I wish to repeat that whether or not in point of fact the local rules in this case permitted a man to have only one hundred feet, we say that that fact was concluded when the matter passed the Land Office, and it was concluded in such a way that the Court was necessarily compelled to decide this question under section 2320 of the Revised Statutes, and the Court said in terms that it construed it under that section. The Circuit Court and the Circuit Court of Appeals both said the same thing, and no one would be quicker to contend that the matter was concluded by the action of the Land Department than the gentlemen upon the other side.

Even though the local rules provided that not more than twenty-five feet could be allowed, if it once passed the Land Department on that question of fact, it was concluded. It has been held over and over again that these local rules are among the questions that can be decided by the Land Office and that its decision upon such questions of fact cannot be collaterally attacked for any purpose whatever. So much for the North Star case.

**The North Star End Line Decision.**

Now Mr. McGee wants me to read something that is entirely foreign to the subject under discussion before the Court.

MR. MCGEE. It is a part of the decision.

MR. WRIGHT. It is a part of the decision, that is true, but it has nothing whatever to do with the question under discussion. However, I will read it.

"The plaintiff in error contends that, if the patented "area of the North Star is to be considered as a location, "its end lines are not parallel as found by the Court, and "that under section 2320 Rev. St., the defendant in error "possesses no extra-lateral rights under it. The act of "1866 under the provisions of which the patent in this "case was applied for and under which the rights of de- "fendant in error accrued, did not require parallelism of "end lines. Walrath v. Mining Company, 63 Fed. 552- "556."

I think Judge Hawley has given birth to several decisions of the same nature, which are exactly in line with this. In the Wyoming case the end lines converged in the direction of the dip of the lode, and it was conceded by counsel that those converging end lines bounded the extra-lateral right.

**The Wyoming—Ural End Line Decision.**

As to the Ural, the same thing was conceded, and on the end line map that I had the pleasure of presenting to the Court, I made no claim of anything outside of the converging end lines; but Judge Hawley, following the

# Diagram B[1].


WYOMING
WYOMING PATENT CODE LINE
Apex of Wyoming or Vein
Apex of Ural or Contact Vein
URAL
URAL PATENT CODE LINE
S. END LINE OF URAL AS FIXED BY COURT.

rule of the Eureka case, gave parallel end lines down to the center of the earth. As to the Ural claim, I think I am correct in saying—he gave parallel end lines cut through the south end line of the Ural claim—

(See Diagram B[1], which was not used at the oral argument.)

MR. LINDLEY. (Interrupting) Judge Hawley constructed an end line at a point where the vein passed out of the side lines, parallel to a line that the lode did not cross, and an appeal was taken to the United States Circuit Court of Appeals from the decision and the whole case was compromised before it ever reached the appellate court. In other words, the Champion Company bought out the Wyoming.

**The North Star Decision, Continued.**

MR. WRIGHT. That is right. (Reading from the North Star case)

"Under this act, 'however tortuous might be the course "'of the lode, the claimant had a perfect right to follow "'it up and prepare his diagram so as to include it, to-"'gether with the surface ground on each side thereof "'allowed by local laws. There is no language in the "'act that requires the diagram to be in the form of a "'parallelogram or in any other particular form.' Wol-"fley v. Mining Co., 4 Colo. 112-116. Moreover, the end "lines marked on the diagram converge in the direction "of the dip, giving the patentees less of the vein or lode "in depth than they had at the surface. The object of "the act of 1872 in requiring parallelism of end lines was "intended to give to the claimant of the lode as much of "the lode or vein in its downward course as he has at the

" surface but no more. It appears from the findings that
" the defendant in error was only allowed 2,200 feet of
" the apex of the lode because it was cut off on the west
" by a ' crossing ' as shown on the diagram. The restric-
" tion of its rights in these particulars cannot be com-
" plained of by the plaintiff in error."

Now, if Mr. McGee has another case of the sort I shall take the greatest pleasure in reading it, because my throat is not sore at all. But this work would naturally devolve upon him.

I have already adverted to this class of cases and I say to theCourt that in every single instance—there is not one single exception—where this rule has been adopted, even in the cases where the end lines converge,—in every single case where this rule has been adopted or suggested, the adoption of the rule or its suggestion has been based upon the remark in the Elgin case which I have already explained by the language which the Supreme Court has picked out for the express purpose, in my opinion, of showing that the next time it gets a chance at a claim that was patented under the law of 1866, it intends to hold, no matter what the shape of the claim is, that the end lines of such claim or patent must be parallel. If there is any comfort to these gentlemen in that last paragraph of the Providence case, they are welcome to it. I say it is premonitory of the decision that will come, just as soon as the next case reaches the Supreme Court of the United States. I say that as a *dictum* of the Supreme Court of the United States, it is entitled to higher weight than the *dictum* it explains, for the rea-

son that it is subsequent in point of time. This *dictum* in the Elgin case has been used by Judge Hawley almost exclusively.

Judge Beatty, an advocate of the old rule, gave extra-lateral rights in the North Star case for the reason that, inasmuch as the reason of the rule of parallelism ceased there, he held that the rule itself ceased, namely, the rule of parallelism being for the purpose of preventing a party from taking more under the ground than he has at the surface, therefore the rule ceases where the end lines converge, because the party will get less under the surface than he has at the surface. Now, that is the ruling, but in my opinion, your Honor, if the rule go that far in the highest court in the land, it will go no farther. As I said before, each and every one of these decisions is based upon the *obiter dictum* in the Elgin case, and it is clear this *obiter dictum* has been explained away by the Supreme Court of the United States itself.

**The New Dunderberg v. Old Case.**

The next important case that I desire to present to the Court and that I desire to analyze with care, is another one of those great cases standing as lights on the mountain top, separate and apart, and it is a case that goes far towards explaining the subject now before the Court.

Judge Lindley read a portion of the case, but he did not read it all. I shall ask the indulgence of the Court

while I re-read it in my own way, that portion which the Judge read, together with a large portion of the case remaining. This case was decided by the Circuit Court of Appeals of the 8th Circuit on March 22, 1897. The Judges were Sanborn and Thayer, Circuit Judges, and Lochren, District Judge. Judge Sanborn delivered the opinion of the Court. Although this decision was rendered early in the year 1897 and "Lindley on Mines" was not issued until the latter portion of that year, it is not discussed in that book.

MR. LINDLEY. Dunderberg v. Old came out after "Lindley on Mines" had gone to press, and that portion of the discussion to which that case refers, had passed out of the press two months before the case was decided.

MR. WRIGHT. This case was a contest over ore within the segment of the Frostberg claim. The end lines of the Frostberg claim were not under discussion.

MR. LINDLEY. That case was cited by me in my opening argument.

MR. WRIGHT. I have already stated that you read a portion of it. Now, the contest here, if your Honor please, was not as to any ore on the dip outside the segment of land owned by the Frostberg people. It was as to ores within the particular segment owned by them. The Frostberg claim was about fifty feet wide. Upon examining the matter, I find that the end lines of the claim were not exactly parallel. There was a divergence of one degree and fifty-eight minutes, but the question of parallelism did not come up in the case so far as the ores in

dispute were concerned. In other words, it was not necessary to a decision of this particular case. But there is so much "meat" in this case, that I would ask your Honor's indulgence while I make a somewhat close analysis of it. I might premise my remarks by saying that the principles discussed here cannot be understood in their entirety by an examination of only the first part of the discussion referring to the Frostberg claim; *the remarks of the Court as to the location called the Dunderberg, must be read in connection with its remarks concerning the Frostberg claim, in order to have a full understanding of the principles laid down in this case.*

I read from New Dunderberg v. Old, 79 Fed. 598:

"But both these claims were located under 'An Act "'granting right of way to ditch and canal owners over "'the public lands and for other purposes,' approved "July 26, 1866, (14 Stat. 251, C. 262). That act gave a "lawful claimant who complied with the provisions of "the statute, the right to the single lode or vein which "he found, and to no other. It is insisted that under the "local laws of Colorado, to which this Act of Congress "referred, the claimant was not required to mark the "boundaries of his claim upon the surface of the ground "when he located it, but was permitted to hold and fol- "low the lode for a distance of 1400 feet in any direction "in which it lay from his discovery shaft, on condition "that he should mark his claim at the point of discovery "by a substantial stake, post or stone monument, having "inscribed thereon the name of the discoverer and the "name of the lode or vein. 14 Stat. 251, Secs. 1, 2. "* * * There was evidence at the trial that the lode "in the possession of the plaintiff in error within the "boundaries of the Frostberg claim was the same lode "which was originally discovered and located in the Dun- "derberg claim in 1867. The Act of Congress of May 10,

"1872, * * * under which the patents to both "claims were issued, provided 'that the locators of all "'mining locations heretofore made * * * where "'no adverse claim exists at the passage of this "'act, * * * shall have the exclusive right of pos- "'session and enjoyment of all the surface included "'within the lines of their locations and of all veins, "'lodes and ledges throughout their entire depth the top "'or apex of which lies inside of such surface lines ex- "'tended downward vertically' (Section 3); that sections "1, 2, 3, 4 and 6 of the act of July 26, 1866, be repealed "but that such repeal should not affect existing rights; "that applications for patents for mining claims then "pending should be prosecuted to a final decision in the "general land office; and that, where adverse rights were "not affected thereby, patents should issue in pursuance "of the Act of May 10, 1872. The contention of the coun- "sel for the plaintiff in error is that the grant in the "Frostberg patent of every vein whose apex lies within "its exterior boundaries, was void except as to the orig- "inal Frostberg claim discovered therein, because that "claim was located under the Act of 1866 which allowed "the discoverer but a single lode or vein; and the loca- "tion of the Dunderberg vein in 1867 constituted a claim "adverse to the Frostberg when the Act of 1872 was "passed, and in that way deprived the officers of the Land "Department of all power to make a grant to the owner "of the Frostberg of any other vein than that which he "originally discovered. If this proposition is sound, the "plaintiff in error was entitled to the vein on the premises "in dispute, if it was in fact the original Dunderberg "vein and was not the original Frostberg vein, and the "Court should have submitted this question to the jury. "It refused to do so, and the correctness of this ruling "is the most important question in this case. If it be "conceded, however, that there was an adverse claim to "the property described in the Frostberg patent when "the Act of May 10, 1872, was passed, that fact could not "render void any part of the grant made by that patent.

"Congress did not remit the determination of the ques-
"tions whether or not there was an adverse claim to the
"Frostberg or whether the patent to it under the Act of
"1872 would affect adverse rights, to the courts of law or
"of equity in the first instance. On the other hand it
"vested the officers of the Land Department with the
"judicial power and imposed upon them the duty to de-
"cide these questions and to issue the patent to the Frost-
"berg mining claim in accordance with the decision
"which they should render."

Necessarily, if your Honor please, if there were adverse claims, then the patent could not issue under the Act of May 10, 1872, but if there were none—if the Land Office should decide that there were no adverse claims—then the patent might issue under the Act of 1872 instead of under the Act of 1866.

I read further:

"It is true that a patent issued by the Land Depart-
"ment of the United States to land over which that de-
"partment has no power of disposition and no jurisdic-
"tion to determine the claims of applicants for, under
"the acts of Congress, is absolutely void and conveys no
"title whatever."

And now I read the special comments of the Court:

"The act of July 26, 1866, provided that any claimant
"of a lode or vein might file a diagram of the same so
"extended laterally or otherwise as to conform to the
"local laws, customs, and rules of miners and might en-
"ter such tract and receive a patent therefor, with a
"right to the vein or lode; that upon the filing of this dia-
"gram and the posting of the same and a notice of inten-
"tion to apply for a patent, the Register of the local land
"office should post and publish the notice 90 days; that,
"if no adverse claim had then been filed, the Surveyor

"General should, on the application of the party, survey "the premises, make a plat thereof, designate the num- "ber and description of the location, and the improve- "ments and character of the vein, and indorse his ap- "proval thereon, and that upon the filing of this plat and "of proof that the diagram and notice had been duly "posted, the Register should transmit the plat and de- "scription to the General Land Office, and the applicant "should receive a patent for the lode and land claimed. "14 Stat. 251, 252, C. 262, Secs. 2, 3. The claimant of the "Frostberg lode had done all this before the Act of 1872 "was passed."

Now I desire to draw a parallel, as we go along, with the case at bar. The final receipt in the Frostberg case was issued, as Judge Lindley stated on Monday, within a few days of the issuance of the final receipt in the Pioneer case.

I read further:

"He had designated the boundaries of his claim. It had "been surveyed and marked on the ground. His notice "of intention to apply for a patent for it had been given. "No adverse claim had been filed in the Land Office and "on February 27, 1872, he had entered it for patent. "When the Act of 1872 was passed he was already en- "titled to the Frostberg lode, and to the surface de- "scribed in his claim under the Act of 1866."

Your Honor will please bear in mind that this decision is referring solely to lodes within the surface boundaries of the Frostberg claim extended downward vertically. The Court goes no further in the decision than that. And so in the case at bar we concede that at the time the Act of May 10, 1872 was passed, the owners of the Pioneer claim owned the Pioneer lode within the segment—with-

in the perpendicular boundaries of that segment known as Lot No. 48 extended downward indefinitely.

I read further:

"Section 3 of the Act of May 10, 1872, * * * pro-
"vided that all locators of mining locations theretofore
"or thereafter made where no adverse claim existed at
"the time of the passage of that act should have the ex-
"clusive right to all veins or lodes whose apexes were
"within their surface boundaries. Section 9 of that act
"provided that sections 1, 2, 3, 4 and 6 of the act of July
"26, 1866, * * * were repealed; that such repeal
"should not affect existing rights and that 'applications
"'for patents for mining claims now pending may be
"'prosecuted to a final decision in the General Land
"'Office but in such cases where adverse rights are not
"'affected thereby patents may issue in pursuance of
"'the provisions of this act.' THESE PROVISIONS
"OF THE ACTS OF CONGRESS LEAVE NO DOUBT
"THAT THE LAND DEPARTMENT HAD JURISDIC-
"TION TO HEAR AND DETERMINE THE CLAIMS
"OF APPLICANTS FOR AND TO DISPOSE OF THIS
"MINING CLAIM AND EVERY VEIN OR LODE
"WHOSE APEX LAY INSIDE OF ITS SURFACE
"LINES EXTENDED DOWNWARD VERTICALLY.
"When the Act of May 10, 1872 was passed, the Frost-
"berg claim had been located and the application for the
"patent to it was pending. THAT ACT BY ITS VERY
"TERMS IMPOSED UPON THE OFFICERS OF THE
"LAND DEPARTMENT THE DUTY OF HEARING
"THE EVIDENCE UPON AND DECIDING THE
"QUESTIONS WHETHER OR NOT ANY CLAIM AD-
"VERSE TO THAT LOCATION EXISTED AT THE
"TIME OF ITS PASSAGE, AND WHETHER OR NOT
"ANY ADVERSE RIGHTS WOULD BE AFFECTED
"BY ISSUING THE PATENT ACCORDING TO THE
"PROVISIONS OF THE ACT OF 1872. THESE QUES-
"TIONS WERE NECESSARILY DETERMINED BY

"THE OFFICERS OF THAT DEPARTMENT BE-
"FORE THEY ISSUED THIS PATENT. THE PAT-
"ENT WHICH THE DEPARTMENT ISSUED IN 1876
"WAS A JUDGMENT OF THAT TRIBUNAL THAT
"NO SUCH CLAIM DID EXIST ON MAY 10, 1872,
"AND THAT NO ADVERSE RIGHTS WOULD BE
"AFFECTED BY ISSUING IT IN ACCORDANCE
"WITH THE PROVISIONS OF THE ACT OF THAT
"DATE. IT IS AT THE SAME TIME A JUDICIAL
"DETERMINATION OF THESE QUESTIONS AND A
"CONVEYANCE OF THE LEGAL TITLE TO EVERY
"LODE OR VEIN WHOSE APEX LAY WITHIN THE
"SURFACE BOUNDARIES OF THE PATENTED
"CLAIM EXTENDED DOWNWARD VERTICALLY."

Our opponents in this controversy claim that their rights were crystallized and vested before the passage of the Act of May 10, 1872. But this Court says that the Land Department had jurisdiction to set on foot an inquiry for the very purpose of ascertaining whether a patent could in such a case, be issued under the law of May 10, 1872, one of the provisions of which is that the end lines shall be parallel to each other. The fourth ruling of the Court in the Eureka case, which counsel on the other side will certainly not now deny,—the fourth ruling is to the effect that the old locations were subject to the restrictions of the Act of May 10, 1872. As I said a moment ago, this inquiry was set on foot for the express purpose of ascertaining whether the privileges allowed by the act of May 10, 1872, could be granted in this patent. Now, can it be doubted for one moment that, if an inquiry was set on foot to ascertain whether certain privileges arising under that Act could be granted, it was the duty of the

Land Department at the same time, at the instance of the owners, to make such a change as would allow them these extra-lateral rights? Beyond peradventure it would have allowed them to draw in their end lines if they had so desired. Of course, as in the case at bar, the Land Department could issue a patent to the *land*, but if the owner of the land did not come forward and ask for the privilege of everlastingly securing his title to the outside portions of the lode, by making his end lines parallel so as to comply with the provisions of Section Two of the Act of 1872, how could he come in under the provisions of Section Three of the act? Can it be asserted here that he has a right to these privileges?

These rights were not crystallized. It was the duty of the Land Department to make this inquiry. The Act of May 10, 1872, was upon the statute books. Ignorance of the law excuses nobody. And if the owner of the Pioneer Mine was content to sit still and allow his rights and privileges under the act of 1872 to float away from him; if he chose by his own *laches* to let these great privileges pass by, can he come now and ask that this Court restore them to him?

These cases and this Dunderberg case particularly, throw a great deal of light upon this subject. As I said before, one of the questions to be decided by the Land Department was whether this patent could be issued under the act of May 10, 1872. This Court says it was the duty of the Land Department to make a judicial investigation of the facts necessary and decide that question. Now the

owner of the Pioneer Mine had notice of that fact the same as the Land Department, and if he slept upon his rights, he had no one to blame but himself, and the plaintiff here cannot now be heard to ask for rights that were lost by the negligence of its predecessor in title.

I know counsel will be heard to say, as he has said before, that this statute refers only to the special privileges to be conferred; but I say that, according to the elementary principles of law, and under the provisions of this statute construed line by line, the privileges of the statute can only be enjoyed when the owner of the property is subjected to its restrictions; its privileges and its restrictions go hand in hand. We hear nothing of an investigation as to parallel end lines in the New Dunderberg case, because that particular question was not before the Court. The particular question was whether ownership of the special privileges permitted by the Act of 1872 could be enjoyed, whether the owner of the Frostberg claim owned those additional lodes, and, according to the Court, it took a judicial inquiry by the Land Department to determine the facts—to determine the facts necessary to enable it to act in the particular manner followed.

In the Pioneer case it is clear from a reading of the patent itself that that same investigation was had, because there is a grant of those additional lodes in the Pioneer patent.

In this connection, I may be permitted to say that investigations in the Land Department after final receipt

is issued, are matters of every day occurrence. It is not true that these rights crystallize and are vested by the issuance of the final receipt. The Land Department holds control until the patent is finally issued; the cancellation of entries is a matter of every day occurrence; and the rule is that third parties purchase subject to the equities between the owner of the final receipt and the government. If a third party choose to buy a final receipt, he may do so, but the government's equities remain. I confess I have no brief on this subject and for the very reason that the volumes of decisions of the Land Department are simply full from one end to the other, of this class of cases. If they were not correct, undoubtedly the Courts would prevent the Land Department from doing any such thing. Writs of mandamus would lie, and writs of prohibition would prevent any such proceeding; but it is a matter of every day occurrence in the Land Department and it holds control in these matters as between the claimant and the government, until the patent is finally issued.

(*At this point the Court adjourned until Thursday, October 20, 1898, at 10 o'clock A. M. when Mr. Wright resumed his argument as follows*):

**Review of Dunderberg v. Old, Continued.**

If your Honor please, pursuant to my review of the case of New Dunderberg Mining Company v. Old, I will read now the conclusion of the Court upon the facts re-

viewed yesterday, which were merely a résumé of the law governing the right of the Courts to review patents:

"Our conclusion is that a patent issued under and in "accordance with the provisions of the Act of May 10, "1872, * * * to a mining claim located before the "passage of that act, conveys the legal title to every vein "or lode of mineral whose apex is within its surface lines "extended downward vertically, and is not subject to "collateral attack in an action at law, either on the "ground that there was a claim adverse to that patent "when the act of 1872 was passed, or on the ground that "adverse rights were affected by its issue under the pro-"visions of that act."

Your Honor will remember that it was shown in my review yesterday, that this was because jurisdiction was conferred upon the Land Office by the Act of 1872 itself, to open up the subject and to settle and determine the questions necessary to a decision that the patent could be issued under the Act of 1872.

The Court then takes up the title of the New Dunderberg lode and says:

"Moreover, neither the plaintiff in error nor its im-"mediate or remote grantor was ever in a position to "attack the Frostberg patent, either at law or in equity, "at any time after the patent to the Dunderberg claim "was issued, on September 16, 1873. Conceding, but not "deciding, that the locator of the Dunderberg claim, in "1867, then had the right, under the Act of 1866, to follow "the Dunderberg lode in any direction from his discovery "shaft in which it lay, he renounced that right when he "availed himself of the benefits of the Act of 1872, and "accepted his patent under that statute."

Observe the language of the Court, if your Honor

please. "He renounced that right when he availed him-"self of the benefits of the Act of 1872 and accepted his "patent under that statute." Under the old régime it was one of the most cherished doctrines among the miners that they had a right to locate the lode and to claim it and to work it as they saw fit, in any direction from a given point. This right was swept away by the act of 1872 and by the decision in the Flagstaff case. The Court go on to say:

"That act"—to wit, the act of 1872—"provided that "he might obtain a patent according to its terms, or that "he might retain the rights he had acquired under the "act of 1866."

Now, here is a clear and frank judicial expression of the position of the defendant here; of the claim we make that the patent must issue one way or the other; that it necessarily follows from the language of the statute itself, that where applications were pending when the Act of 1872 was passed, patents may issue under the provisions of the Act of 1866, or if no adverse rights had intervened, then the patent may issue under the Act of 1872; but that it cannot issue under both acts in the sense that both acts shall be controlling. One or the other must control. This whole discussion has shown, and I think clearly, that the Act of 1872 must control. Even the Eureka case, the decision brought forward by Mr. Lindley himself, shows that to be the rule.

The fourth ruling in the Eureka case lays it down beyond peradventure. That ruling has never been overturned any where and it is firmly established that is the rule.

I quote again the Court's language in the New Dunderberg case:

"THAT ACT PROVIDED THAT HE MIGHT "OBTAIN A PATENT ACCORDING TO ITS TERMS "OR THAT HE MIGHT RETAIN THE RIGHTS HE "HAD ACQUIRED UNDER THE ACT OF 1866."

Here is a clear implication that if he had any extraordinary rights under the act of 1866 which he might have maintained under that act, he renounced them when he accepted his patent under the act of 1872, and that is all we claim in the case at bar.

The Court goes on to say:

"He could not obtain a patent, however, under either "act until he located the boundaries of his claim upon "the surface of the ground and limited his claim by those "boundaries. We have already seen that the Act of 1866 "required such a location before a patent could issue. "The Act of 1872 required the applicant for a patent to "file his application with a plat or field notes of the claim "by the Surveyor General, showing accurately the bound-"aries of his claim. It required him to post a copy of "the plat and of the notice of his application for a patent "on the land claimed, and it required him to file a copy "of this notice and proof of the posting in the local land "office. The register of that office was then required to "post and publish notice of the application for sixty days, "and thereupon a patent issued if no adverse claim was "filed. * * * That act provided that the patentee "under it should have the right to all lodes and veins "whose apexes were within the surface boundaries of his "claim. The patentee of the Dunderberg lode located his "claim, and accepted a patent for it, under the terms of "this act."

Now, your Honor will notice that the word "locate" is not used here in the sense of making an original location. It means the location of the claim for patent. The original location of this claim was made long before the act of 1872 was passed, but the location intended is such a location as is made by the Surveyor General at the time of the application for patent.

"He located it upon a tract of land which included his "discovery shaft, and was 3,000 feet long from north to "south, and 70 feet wide from east to west. It may be "that he could have held the Dunderberg lode within "the surface boundaries of the Frostberg claim if he had "so located his claim upon the surface of the ground "that the apex of the Dunderberg lode within the Frost-"berg claim would have been within the exterior bound-"aries of the Dunderberg claim upon the surface, but he "did not do so. He chose to so locate it that his lode "crossed both the side lines of his claim diagonally on "its strike, and passed out of the claim more than 300 "feet before it entered the Frostberg claim. The claim "of his grantee now is that it can renounce this location."

Observe the parallelism with the case at bar. The claim is made by the grantee, as in the case at bar, by the grantee and not by the original patentee.

"The claim of his grantee now is that it can renounce "this location and the limitations of the law and the "patent upon which it is based, and follow the lode "wherever it leads, as the discoverer might have done "when he first found it, and before he located his claim "to the surface at all."

Just as here, where the plaintiff makes a claim that it can renounce the claim which its predecessor in interest

made and the limitations of law attaching to that location, and the patent upon which it is based, and that it can claim this extraordinary right, notwithstanding the fact that its predecessor in interest made this location in this form (showing as on diagram Q) and allowed it to remain more than three months after the Act of 1872 had passed, laying down the law and the limitation.

"It bases this claim upon the provision of Section 9 of "the act of May 10, 1872, * * * that the repeal of "sections 1, 2, 3, 4 and 6 of the act of July 26, 1866, "* * * shall not affect existing rights. BUT IT "WAS NOT THE REPEAL OF THESE SECTIONS "OF THE ACT OF 1866 THAT AFFECTED THE "RIGHTS OF THE OWNER OF THE DUNDERBERG "LODE. THAT REPEAL DID NOT DEPRIVE HIM "OF ANY RIGHT HE HAD TO FOLLOW HIS LODE "INTO THE FROSTBERG CLAIM. IT WAS HIS LO-"CATION, ENTRY AND PATENT OF HIS CLAIM, "FROM WHICH THE LODE DEPARTED ON ITS "STRIKE THREE HUNDRED FEET BEFORE IT "REACHED THE FROSTBERG, THAT AFFECTED "HIS RIGHTS. The act of 1872 required the applicant "for a patent to locate his claim on the surface of the "ground as a condition precedent to its issue, and it de-"clared what rights he should acquire thereby for the "express purpose of defining, fixing and limiting his "claims and his rights."

Now, that is the purpose, if your Honor please, of all patents; the purpose is to define, fix and limit the claims and rights of the party holding a mining claim under the patent.

"Under that act, the location of a mining claim on the "surface of the ground and its entry for patent is a notice

"to the government and the public that the owner claims "all the exclusive rights and privileges granted by the "act; BUT IT IS NO LESS A NOTICE AND A LEGAL "NOTICE THAT HE RENOUNCES AND ABANDONS "TO THE GOVERNMENT ALL OTHER RIGHTS AND "PRIVILEGES PERTAINING TO HIS DISCOVERY "OF THE LODE FOR WHICH HE ASKS THE "PATENT."

And so we say here that, when the predecessor in interest of the plaintiff permitted this mine to go to patent under the act of 1872, that was a notice to the government and the public that the owner claimed all the exclusive rights and privileges granted by the act of 1872; but that it was no less a notice, and a legal notice that it renounced and abandoned to the government all other rights and privileges pertaining to its discovery of the lode for which it asked a patent, including the extra-lateral right.

The Court go on to say:

"It would work manifest injustice to permit one who has "located, and excluded all others from a claim of the full "size allowed by the acts of congress, and from all veins "whose apexes lay within its surface, to follow the lode "upon the discovery of which that claim was based at "right angles to his location, and without its side lines "for a distance equal to the length of his claim. IN OUR "OPINION, THE ACTS OF 1866 AND 1872 CONFER "NO SUCH PRIVILEGE. A CLAIMANT WHO DIS-"COVERED AND LOCATED A LODE MINING "CLAIM UNDER THE ACT OF 1866, RENOUNCES "AND ABANDONS ALL RIGHTS AND PRIVILEGES "TO FOLLOW HIS LODE ON ITS COURSE BEYOND "THE EXTERIOR LINES OF HIS PATENTED "CLAIM, WHEN HE LOCATES IT UPON THE SUR-"FACE OF THE GROUND, ENTERS IT AND

"ACCEPTS A PATENT FOR IT UNDER THE ACT "OF MAY 10, 1872."

Can it be possible that this great right was renounced by accepting the patent under the Act of 1872 and that the right claimed here is retained? Certainly not. The rule of law is necessarily the same in both instances.

Then follows merely a repetition of the rule in the Flagstaff case as to the side lines being the end lines when the lode crosses the claim at right angles.

Now, here, if your Honor please, as I said before, is one of the great cases marking progress—marking a particular step in the evolution of the mining law. There is no declaration of a new principle here; it is merely the enunciation of a principle found within the statute itself, and found within the practice of the Land Department under the decisions of the United States Supreme Court.

**The Del Monte v. Last Chance Case.**

I come now to the presentation of what is perhaps the greatest, as it is certainly the most interesting, of all the mining decisions. I refer to the case of Del Monte M. & M. Co. v. Last Chance M. & M. Co., 171 U. S. 55. I have no doubt your Honor will read this case with more than ordinary care, because it is such a full and clear exposition of the principles of the mining law, and was apparently intended by the Court to leave every point so clear that there can be no mistaking what the Court means.

I shall not read all or even a large proportion of this decision. It is very long and I shall read only a certain

few of the principles laid down in it, such as I think are applicable to this particular discussion.

The Court first reviews the various enactments touching upon the subject of mining. It then reviews the history of the locations made under the Act of 1866, and uses as its illustration a location made in the shape of a broom, the body of the broom representing the surface of the land located, and the handle representing the lode line, and it then takes up the Flagstaff case as showing—I think it is well for me to read what it says on that point:

"Even under this statute," the Court says, "although "its express purpose was primarily to grant the single "vein, YET THE RIGHTS OF THE PATENTEE BE-"NEATH THE SURFACE WERE LIMITED AND "CONTROLLED BY HIS RIGHTS UPON THE SUR-"FACE. If, in fact, as shown by subsequent explora-"tions, the vein on its course or strike departed from the "boundary lines of the surface location, the point of de-"parture was the limit of right. In other words, he was "not entitled to the claimed and patented number of feet "of the vein, irrespective of the question whether the "vein in its course departed from the lines of the surface "location."

Then follows a review of the Flagstaff litigation. I have already read so much from that case, that it is unnecessary to repeat the language as it is cited here. The Court deduces from its review of that case, however, the following:

"These decisions"—McCormick v. Varnes, 2 Utah 355, and the Flagstaff case—"show that while the express "purpose of the statute was to grant the vein for so

"many feet along its course, yet such grant could only "be made effective by a surface location covering the "course to such extent. This act of 1866 remained in "force only six years, and was then superseded by the "Act of May 10, 1872, * * * found in the Revised "Statutes, sections 2319 and following. This is the "statute which is in force to-day, and under which the "controversies in this case arise."

To recur for a moment to the language which has been read just now:

"THESE DECISIONS SHOW THAT WHILE THE "EXPRESS PURPOSE OF THE STATUTE WAS TO "GRANT THE VEIN FOR SO MANY FEET ALONG "ITS COURSE, YET SUCH GRANT COULD ONLY BE "MADE EFFECTIVE BY A SURFACE LOCATION "COVERING THE COURSE TO SUCH EXTENT."

Now it is universally conceded that this applies to the length of the vein on its course, but under a statute which only allows so many feet of the lode, is there not a clear necessity, if your Honor please, for a method of definition of those feet? In other words, is there not a clear necessity for a definition of the end lines, or the end bounding planes, as we now call them? And was any stable and certain method of definition ever invoked except by the lines of the surface plat itself? There never was, and if a locator has been so unfortunate as not to define his end lines, has the Court the right to make end lines? All the decisions say otherwise, and this decision says so particularly, as I will show to your Honor presently.

It is our contention that without a rule such as we claim, there is no definition of the extra-lateral right or description of the segment of the vein intended to be conveyed. The statute of 1866 provided no means of definition excepting the location on the surface and no other means has ever been devised or permitted by any statute since.

The Court next cites the first section of the Act of 1872. This section is the same in substance as the first section of the Act of 1866. I will read these sections. For the purpose which I will call to your Honor's attention presently, it is important to know that the first section of the Act of 1866 and the first section of the Act of 1872, are substantially the same.

"All valuable mineral deposits in lands belonging to "the United States, both surveyed and unsurveyed, are "hereby declared to be free and open to exploration and "purchase, and the lands in which they are found to oc- "cupation and purchase, by citizens of the United States "and those who have declared their intention to become "such, under regulations prescribed by law, and accord- "ing to the local customs or rules of miners in the sev- "eral mining districts, so far as the same are applicable "and not inconsistent with the laws of the United "States."

This is the first section of the Law of May 10, 1872, and I particularly call your Honor's attention to the fact that these locations are necessarily made upon lands of the United States whether made under the Act of 1866 or under the Act of 1872. It cannot be otherwise. These privileges could not be granted by the government upon

private land, and of course the land must be public land.

I am aware that there is an idea prevalent in some sections of the mining community that the extra-lateral right is a natural right. This idea is stated in a somewhat definite form in the case of Doe v. Sanger, 83 Calif. 203. I do not intend to read from it, but merely state that this idea prevailed to such an extent as to get into the decisions of the Courts. The decision was written by Judge McFarland, and he takes ground as though the extra-lateral right were as much a part of the common law of the land as the right to go down vertically from the surface to the center of the earth, when you own the surface.

But let us see what the Supreme Court of the United States says on this point. I read further from the Del Monte case the comments of the Court on the section of the statute just quoted:

"It needs no argument to show that if this were the "only section bearing upon the question, patents for land "containing mineral, would, except in cases affected by "local customs and rules of miners, be subject to the "ordinary rules of the common law, and would convey "title to only such minerals as were found beneath the "surface."

I submit to your Honor that that of itself would be a great privilege. Is there any other government on the face of the earth that has permitted its citizens to go under its soil and take out these crown minerals, except the government of the United States? Would not that be a much greater privilege than was to be expected?

Even under the law of England, as your Honor well remembers, the gold and silver were reserved, even when the fee was granted. They were crown minerals, but our government with open hand allows a man to take everything under the surface. Would not that be a sufficient privilege?

Are the citizens of this country in a position to *demand* this most extraordinary privilege, not only of taking the gold and silver from under their own soil but to go under the soil of their neighbors and take them there also? It is only the generosity of our government that has permitted this extraordinary privilege under any circumstances.

And the Court now proceeds to define the circumstances under which this privilege may be exercised:

"We therefore turn to the following sections to see "what extra-lateral rights are given and upon what con- "ditions they may be exercised. And it must be borne "in mind in considering the questions presented that we "are dealing simply with statutory rights. There is no "showing of any local customs or rules affecting the rights "defined in and prescribed by the statute, AND BE- "YOND THE TERMS OF THE STATUTE COURTS "MAY NOT GO. THEY HAVE NO POWER OF LEG- "ISLATION. THEY CANNOT ASSUME THE EXIST- "ENCE OF ANY NATURAL EQUITY, AND RULE "THAT BY REASON OF SUCH EQUITY A PARTY "MAY FOLLOW A VEIN INTO THE TERRITORY "OF HIS NEIGHBOR, AND APPROPRIATE IT TO "HIS OWN USE. If cases arise for which Con- "gress has made no provision, the courts cannot "supply the defect. CONGRESS HAVING PRE- "SCRIBED THE CONDITIONS UPON WHICH

"EXTRA-LATERAL RIGHTS MAY BE ACQUIRED, "A PARTY MUST BRING HIMSELF WITHIN "THOSE CONDITIONS OR ELSE BE CONTENT "WITH SIMPLY THE MINERAL BENEATH "THE SURFACE OF HIS TERRITORY: It is undoubt- "edly true that the primary thought of the statute is the "disposal of the mines and minerals, and in the interpre- "tation of the statute this primary purpose must be "recognized and given effect. Hence, whenever a party "has acquired the title to ground within whose surface "area is the apex of a vein with a few or many feet along "its course or strike, a right to follow that vein on its dip "for the same length ought to be awarded to him if it "can be done, and ONLY IF IT CAN BE DONE, UNDER "ANY FAIR AND NATURAL CONSTRUCTION OF "THE LANGUAGE OF THE STATUTE. If the sur- "face of the ground was every where level and veins con- "stantly pursued a straight line, there would be little "difficulty in legislation to provide for all contingencies; "but mineral is apt to be found in mountainous regions, "where great irregularity of surface exists, and the "course or strike of the veins is as irregular as the sur- "face, so that many cases may arise in which the statu- "tory provisions will fail to secure to a discoverer of a "vein such an amount thereof as equitably it would seem "he ought to receive. We make these observations be- "cause we find in some of the opinions assertions by the "writers that they have devised rules which will work "out equitable solutions of all difficulties."

I have no doubt the Court in this language referred to the case of King v. Amy, 24 Pac. 200, where Judge De-Witt, who wrote the opinion for the Montana Supreme Court, worked out a system which seems to me the best possible for the solution of these mining questions. It is most ingenious, it is extremely interesting, and I think it probably met the general approval of the bar at the

time the decision was rendered and before it went to the Supreme Court of the United States.

I read further:

"Perhaps those rules may have all the virtues which "are claimed for them, and if so it were well if Congress "could be persuaded to enact them into statute; but be "that as it may, THE QUESTION IN THE "COURTS IS NOT, WHAT IS EQUITY? BUT "WHAT SAITH THE STATUTE? Thus, for in- "stance, there is no inherent necessity that the end lines "of a mining claim should be parallel, YET THE STAT- "UTE HAS SO SPECIFICALLY PRESCRIBED. (SEC- "TION 2320). IT IS NOT WITHIN THE PROVINCE "OF THE COURTS TO IGNORE SUCH PROVISION, "AND HOLD THAT A LOCATOR, FAILING TO COM- "PLY WITH ITS TERMS HAS ALL THE RIGHTS, "EXTRA-LATERAL AND OTHERWISE, WHICH HE "WOULD HAVE BEEN ENTITLED TO IF HE HAD "COMPLIED, AND SO IT HAS BEEN ADJUDGED. "Iron Silver Mining Company v. Elgin Mining & S. Com- "pany, 118 U. S. 196. This case, which is often called "the 'Horseshoe Case,' on account of the form of the "location, is instructive. The following diagram, which "was in the record in that case, illustrates the scope of "the decision:" (Here follows diagram of the Stone claim as shown in Diagram J.) "The locator "claimed in his application for a patent the "lines 1, 14 and 5, 6, as the end lines of his lo- "cation, and because of their parallelism, that he had "complied with the letter of the statute, but the Court "ruled against him, saying in the opinion (page 208): "'The exterior lines of the Stone claim formed a curved "'figure somewhat in the shape of a horseshoe, and its "'end lines are not and cannot be made parallel. What "'are marked on the plat as end lines are not such. The "'one between numbers 5 and 6 is a side line. The "'draughtsman or surveyor seemed to have hit upon two

" ' parallel lines of his nine-sided figure, and apparently
" ' for no other reason than their parallelism called them
" ' end lines.

" ' We are therefore of opinion that the objection that,
" ' by reason of the surface form of the Stone claim, the
" ' defendant could not follow the lode existing therein
" ' in its downward course beyond the lines of the claim,
" ' was well taken to the offered proof.' "

After this quotation from the Elgin case, the Court in the Del Monte case goes on to say:

" It is true the Court also observed that if the two
" lines named by the locator were to be considered the
" end lines," (showing as on Diagram J) " no part of the
" vein in controversy fell ' within the vertical planes
" ' drawn down through those lines ' " (referring to Diagram J) " ' continued in their own direction.' But not-
" withstanding this observation, the point of the decision
" was that the lines, which were the end lines of the lo-
" cation as made on the surface of the ground, were not
" parallel, and that this defect could not be obviated by
" calling that which was in fact a side line, an end line.
" This is made more clear by the observations of the
" Chief Justice, who with Mr. Justice Bradley, dissented,
" in which he said:"—

I have already read this dissenting opinion to your Honor in another part of this discussion, and your Honor is aware that it is to the effect that the end lines should be drawn through the end points at right angles to the general course of the lode.

And so, after it has been claimed perhaps hundreds of times that the gist of the decision in the Elgin case, was that, inasmuch as the end lines that were marked upon the map as such did not include the ground in dispute,

therefore plaintiff could not recover, now we have the matter explained by the Supreme Court saying that the Elgin case meant exactly what it said when it said that the end lines of a claim must be parallel in order that there should be an extra-lateral right.

Following its quotation of Chief Justice Waite's dissenting opinion, the Court says:

"In other words, the Court took the location as made "on the surface by the locator, determined from that "what were the end lines, and made those surface end "lines controlling upon his rights, and REJECTED THE "CONTENTION THAT IT WAS PROPER FOR THE "COURT TO IGNORE THE SURFACE LOCATION "AND CREATE FOR THE LOCATOR A NEW LOCA-"TION WHOSE END LINES SHOULD BE CROSS-"WISE OF THE GENERAL COURSE OF THE VEIN "AS FINALLY DETERMINED BY EXPLORATION."

Now I submit that the plaintiff in the case at bar is demanding that this Court *make a new location* for it at this late day, more than twenty-five years after its claim was patented, and that the Court grant an extra-lateral right in connection with such location.

The Court further comments:

"That this decision and that in the Tarbet case, *supra*, "were correct expositions of the statute, and correctly "comprehended the intent of Congress therein, is evi-"dent from the fact that, although they were announced "in 1885 and 1878, respectively, Congress has not seen fit "to change the language of the statute, or in any manner "to indicate that any different measure of rights should "be awarded to a mining locator."

Then the Court takes up one of the great questions that has been propounded to it by the Court of Appeals below. Your Honor knows that this decision was rendered in answer to four questions propounded by the Court of Appeals for the Eighth Circuit. I presume your Honor is already familiar with the diagram, the Del Monte diagram. (See Diagram H[1]).

THE COURT. Yes, I have examined that somewhat.

MR. WRIGHT. (Reading) "The first is:

"May any of the lines of a junior lode location be laid "within, upon, or 'across the surface of a valid senior "'location for the purpose of defining for or securing to "'such junior location underground or extra-lateral "'rights not in conflict with any rights of the senior "'location?'

"By section 2319, quoted above, the mineral deposits "which are declared to be open to exploration and pur- "chase, are those found in lands belonging to the United "States, and such lands are the only ones open to occu- "pation and purchase."

I have already called your Honor's attention to the similarity between sections 2319 of the Revised Statutes, which is the same as the first section of the Act of 1872, and the first section of the Act of 1866, and the Court here calls particular attention to the fact that these enactments referred to lands that belonged to and are under the control of the United States government.

I read further:

"WHILE THIS IS TRUE, IT IS ALSO TRUE THAT "UNTIL THE LEGAL TITLE HAS PASSED, THE "THE PUBLIC LANDS ARE WITHIN THE JURIS- "DICTION OF THE LAND DEPARTMENT, AND, AL-

Diagram H¹.


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s
LAST CHANCE
APEX
7263 A.
DEL MONTE
NEW YORK
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b
c
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7356
7406
APEX
l
m

"THOUGH EQUITABLE RIGHTS MAY BE ESTAB-
"LISHED, CONGRESS RETAINS A CERTAIN MEAS-
"URE OF CONTROL. MICHIGAN LAND & LUMBER
"COMPANY vs. RUST, 168 U. S. 589. THE GRANT IS,
"AS IS OFTEN SAID, IN PROCESS OF ADMINIS-
"TRATION. Passing to section 2320, beyond the recog-
"nition of the governing force of customs and regula-
"tions and a declaration as to the extreme length and
"width of a mining claim, IT IS PROVIDED THAT 'NO
"'LOCATION OF A MINING CLAIM SHALL BE
"'MADE UNTIL THE DISCOVERY OF THE VEIN
"'OR LODE WITHIN THE LIMITS OF THE CLAIM
"'LOCATED. * * * THE END LINES OF EACH
"'CLAIM SHALL BE PARALLEL TO EACH
"'OTHER.'"

*Here, if your Honor please, is the doom of the plaintiff in the case at bar, in the paragraph I have just read, unmistakably. Can counsel for the plaintiff by any ingenuity, show to this Court that the title of the Pioneer Mine was not "in process of administration," within the meaning of the Court's language, at the time of the passage of the Act of 1872? Can he show that it was beyond the jurisdiction of Congress, when even his own authority, the Eureka case, in its most prominent feature, declares that the rights of locators under the Act of 1866 were subject to the provisions of the Act of 1872?*

**The Michigan v. Rust Case.**

I think that before completing my remarks on the Del Monte case, I will read from the case of Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, cited by the Supreme Court in the paragraph I have last read, so as to see whether the Supreme Court of the United States in the Del Monte case knew what it was talking about, and

meant what it said. The Court in the Del Monte case, by the language I have quoted, evidently intended to show the point at which the government relinquishes its control, as owner over a piece of land, a piece of mining land.

The language is to the effect that, until the legal title has passed the lands are within the jurisdiction of the Land Department, and that although equitable rights may be established, Congress retains a certain measure of control and the grant remains in process of administration.

In this case of Michigan Land & Lumber Company against Rust, the lands were granted by Congress and they were surveyed and the claim was made that the fixing of the *locus* by the survey completed the grant, though a new survey was afterwards ordered by the Land Department. The case is a long one and I have consumed so much time that I will read only a portion of it, leaving it for your Honor's special consideration.

The contest was as to when the title of the United States passed, in other words, as to when the title became vested in the individual; and the Supreme Court of the United States says:

"It will be perceived that the act contemplated the "issue of a patent as the means of transferring the legal "title. In Rogers Locomotive Mach. Works v. American "Emigrant Company, 164 U. S. 559, 574, it was said, "speaking in reference to this matter, and after a full re- "view of the previous authorities: 'When he (that is, the "'Secretary of the Interior) made such identification, "'then, and not before, the state was entitled to a patent,

" ' and " on such patent " the fee simple title vested in the " ' state. The state's title was at the outset an inchoate " ' one, and did not become perfect as of the date of the " ' act, until a patent was issued.'

" Generally speaking, while the legal title remains in " the United States, the grant is in process of administra- " tion and the land is subject to the jurisdiction of the " Land Department of the Government."

If your Honor please, if the land is subject to the jurisdiction of the Land Department, how much more is it subject to the jurisdiction and the will of Congress? I read further:

" It is true a patent is not always necessary for the " transfer of the legal title. Sometimes an act of Con- " gress will pass the fee." (Cites authorities). " Some- " times a certification of a list of lands to the grantee is " declared to be operative to transfer such title. (Rev. " Stat. Sec. 2449; Frasher v. O'Connor, 115 U. S. 102). " BUT WHEREVER THE GRANTING ACT SPECIFI- " CALLY PROVIDES FOR THE ISSUE OF A PAT- " ENT, THEN THE RULE IS THAT THE LEGAL " TITLE REMAINS IN THE GOVERNMENT UNTIL " THE ISSUE OF THE PATENT (Bagnell v. Broderick, " 38 U. S., 13 Pet. 426-450); AND WHILE SO REMAIN- " ING THE GRANT IS IN PROCESS OF ADMIN- " ISTRATION, AND THE JURISDICTION OF THE " LAND DEPARTMENT IS NOT LOST."

It is because of this authority, if your Honor please, that I have not chosen to take up the time of the Court in this long argument, by reviewing the authorities presented by counsel on the other side to the contrary doctrine.

MR. LINDLEY. I deny that I have introduced anything to the contrary.

MR. WRIGHT. Well, I am very glad to hear that.

MR. LINDLEY. I have yet to hear of any lawyer that will dispute the law that counsel has just read.

MR. WRIGHT. All right; I make no comment on what counsel has done and the purpose of the citations that he presented to this Court. If I misunderstood the purpose and meaning of those citations, I am very glad of it.

I read further from Michigan v. Rust:

"It is, of course not pretended that when an equitable "title has passed, the Land Department has power to "arbitrarily destroy that equitable title. It has juris- "diction, however, after proper notice, to the party claim- "ing such equitable title and upon a hearing, to deter- "mine the question whether or not such title has passed." (Cites authorities.) "IN OTHER WORDS, THE POWER "OF THE DEPARTMENT TO INQUIRE INTO THE "EXTENT AND VALIDITY OF THE RIGHTS "CLAIMED AGAINST THE GOVERNMENT DOES "NOT CEASE UNTIL THE LEGAL TITLE HAS "PASSED."

This is the law. If the plaintiff's predecessor in interest thought that his patent was not subject to this law, that was his misfortune. He should have known it, and might have known it if he had employed proper counsel. He might have gone into the Land Department and asked that these end lines be made parallel. It is true that it was before the rule was applied in the case of the Tyler claim, which has passed through so much litigation in the United States Courts, and where one end line was drawn in for the very purpose of conferring extra-lateral rights, after the matter got fully within the jurisdiction and

under the control of the Land Department. That feature of the case was fully litigated and the power to so change those lines as to confer extra-lateral rights, was upheld by the Supreme Court of the United States.

MR. LINDLEY. Tyler lost his extra-lateral right.

MR. WRIGHT. He lost a part of it but not by that.

MR. LINDLEY. And that line was drawn in, not for the purpose of defining an extra-lateral right, but for the purpose of obviating a surface conflict on the patent claim.

MR. WRIGHT. Yes, I know, and that by the drawing in of that line the extra-lateral right was made and has been sustained by all the courts.

But to quote again from this case of Michigan v. Rust:

"'A WARRANT AND SURVEY AUTHORIZE "'THE PROPRIETOR OF THEM TO DEMAND THE "'LEGAL TITLE, BUT DO NOT, IN THEMSELVES "'CONSTITUTE A LEGAL TITLE. UNTIL THE CON- "'SUMMATION OF THE TITLE BY A GRANT, THE "'PERSON WHO ACQUIRES AN EQUITY HOLDS "'A RIGHT SUBJECT TO EXAMINATION.' Miller "v. Kerr, 20 U. S., 7 Wheat. 1, 6. After the issue of the "patent the matter becomes subject to inquiry only in "the Courts and by judicial proceedings." (Cites authorities). "This jurisdiction of the department has been "maintained in cases of pre-emption where the entire "purchase money has been paid and a receiver's final "certificate issued." (Cites authorities.)

If a clincher were needed, it seems to me we have it here in this particular case, as we are bound to admit that the purchase money in the case at bar had already been paid when the Act of 1872 was passed.

Now I think I would but waste the time of the Court if I read further from this Michigan v. Rust case. It is a long and thoroughly considered case, decided after the fullest discussion; and the Supreme Court meant what it said there, and when it decided in this case of Del Monte Mining & Milling Company against the Last Chance, that in a mining case as well as in other cases of the public lands, the land does not depart from the control of the Land Department, much less does it depart from the control of the Congress of the United States, until the patent itself is issued.

**Belk v. Meagher and Gwillim v. Donellan.**

Your Honor made an inquiry of me yesterday with reference to the case of Belk v. Meagher. This Del Monte case refers to that case, and also to the language I have quoted from the case of Gwillim v. Donellan, as they play a part here in the application of the rule I have just read; and I will read to your Honor what the Court itself considers the gist of those two decisions. It quotes from the case of Belk v. Meagher, 104 U. S. 279, 284, as follows:

"Mining claims are not open to re-location until the "rights of a former locator have come to an end. A re-"locator seeks to avail himself of mineral in the public "lands which another has discovered. This he cannot "do until the discoverer has in law abandoned his claim, "and left the property open for another to take up. The "right of location upon the mineral lands of the United "States is a privilege granted by Congress, but it can "only be exercised within the limits prescribed by the "grant. A location can only be made where the law al-

"lows it to be done. Any attempt to go beyond that "will be of no avail. Hence a re-location on lands "actually covered at the time by another valid and sub- "sisting location is void; and this not only against the "prior locator, but all the world, because the law allows "no such thing to be done."

And again it quotes from Gwillim v. Donellan, 115 U. S. 45, 49:

"A valid and subsisting location of mineral lands made "and kept up in accordance with the provisions of the "statutes of the United States, has the effect of a grant "by the United States of the right of present and exclu- "sive possession of the lands located. If, when one "enters on land to make a location, there is another loca- "tion in full force, which entitles its owner to the exclu- "sive possession of the land, the first location operates as "bar to the second."

Now these two citations are used here by the Supreme Court for the purpose of showing the full effect and meaning of a location, to show how far a location, as a location, vests title in the locator; and, as your Honor will see, the language is very strong, especially that in Gwillim v. Donellan. It would look as though, taking the language of that case by itself, a location were as effectual in passing title as a patent itself; that it gave to the owner of the location an exclusive ownership, and vested the title in him as effectually as a patent itself.

Now in this discussion I think I have shown very clearly that that could not have been the meaning of the Court, because in the Flagstaff case there was a location under the old law, and it went to patent and a part of the old location was swept away by that decision.

**Review of the Del Monte Case, Continued.**

Now, if that location, which had been kept up, operated as an investiture of title so as to create a vested right, I say the Flagstaff decision would have been impossible. These citations, however, and this reference to the case of Michigan Land & Lumber Company v. Rust, are, as I said, for the purpose of showing at what point the government relinquishes its control over its lands: because this Del Monte decision goes on to show that the government retains its administrative control over the land until the patent passes; and, notwithstanding the strength of the language in the decision of Belk v. Meagher and that in Gwillim v. Donellan, yet the government actually retains to itself, under this Del Monte decision, the right to permit another person, a third person, to go upon located land and to locate and acquire rights by performing certain acts of location upon an already located claim.

Now, I do not wish to be understood as construing this decision to mean that adverse rights could thus be obtained, because the decision itself shows that the acts so permitted are not an interference with or curtailment of the rights of the first locator.

But the decision is to the effect that, in order to make your end lines parallel, so as to obtain an extra-lateral right, which is at all times the underlying purpose of the law—a locator has to see particularly that the end lines of his claim are parallel, so that he may have under the land the full extent of his lode that he has at the surface, and he cannot have any more—in order to carry out this

primary purpose of the law, the government retains its jurisdiction over a location up to the time of the issuance of the patent, and to such an extent as to permit a second locator to go and set his stakes upon located land for the purpose of making parallel the end lines of a second claim.

THIS IS A MOST EXTRAORDINARY RESERVATION AND IT IS VERY MUCH STRONGER THAN THE RESERVATION CLAIMED IN THE CASE AT BAR. IF SUCH A RIGHT IS RETAINED BY THE GOVERNMENT FOR THE PURPOSE OF ENABLING A THIRD PARTY, A STRANGER, TO ACQUIRE THE FULL TITLE PERMITTED TO HIM BY THE MINING LAWS OF THE UNITED STATES, HOW MUCH MORE CERTAIN IT IS THAT THE JURISDICTION OF THE LAND DEPARTMENT IS RETAINED FOR THE PURPOSE OF PERMITTING THE APPLICANT HIMSELF, THE CLAIMANT HIMSELF, TO GO AND MAKE SUCH A RE-ADJUSTMENT OF HIS LINES AS TO MAKE SURE OF THE EXTRA-LATERAL RIGHT. CAN THERE BE ANY DOUBT THAT THE PETITION OF PLAINTIFF'S PREDECESSOR IN TITLE WOULD HAVE BEEN ENTERTAINED BY THE DEPARTMENT AND FAVORABLY ACTED UPON, IF HE HAD MADE IT?

There are in this world, if your Honor please, a great number of people who think themselves above the law; who think that the restrictions of the law are made for other people but not for themselves; and there can be no

doubt that the applicant for this patent was of that class, and that when he read, as he must have read, that provision of the law which states that "the end lines of each "claim shall be parallel to each other," and found that provision a universal provision, one which by its association with the other language of the statute was clearly intended to be universal,—whoever he was that controlled this application, he considered that it was not to apply to him: to some one else, but not to him. And he slept upon his rights, and his successor in interest must bear the penalty.

We have now seen what has become of the doctrine that the statute is "merely directory." This decision is no Eureka decision. This decision says, "it is not within "the province of the Courts to ignore such a provision," and immediately follows the statement that this land remained—because it applies directly here—that this Pioneer mine remained under the control of the Land Department until the issuance of the patent in August, 1872, and immediately thereafter follows in direct and necessary connection the language quoted from the statute itself, "the end lines of each claim shall be parallel to "each other."

All through this Del Monte decision the doctrine of parallelism is paramount. Here is what the decision says further:

"It will also be noticed that the locator is not com-
"pelled to follow the lines of the government surveys, or
"to make his location in any manner correspond to such

" surveys. The location may, indeed, antedate the public " surveys, but whether before or after them, the locator " places his location where, in his judgment, it will cover " the underlying vein. *The law requires that the end lines* " *of the claim shall be parallel.* It will often happen that " locations which do not over-lap are so placed as to leave " between them some irregular parcel of ground. Within " that, it being no more than one locator is entitled to " take, may be discovered a mineral vein and the discov- " erer desire to take the entire surface, and yet it be im- " possible for him to do so and make his end lines parallel " unless, for the mere purposes of location, he be per- " mitted to place those end lines on territory already " claimed by the prior locators."

This privilege is granted by this decision. The major part of the decision is upon that particular point.

I read further:

" To say that the subsequent locator must—when it " appears that his lines are to any extent upon territory " covered by a prior valid location—go through the form " of making a re-location, simply works delay and may " prevent him, as we have seen, from obtaining an amount " of surface to which he is entitled, unless he abandons " THE UNDERGROUND AND EXTRA-LATERAL " RIGHTS WHICH ARE SECURED ONLY BY PAR- " ALLEL END LINES.

Always and every where parallelism. I read further:

" In this connection it may be properly inquired, what " is the significance of parallel end lines? Is it to secure " the locator in all cases a tract in the shape of a parallel- " ogram? Is it that the surveys of mineral land shall be " like the ordinary public surveys in rectangular form, " capable of easy adjustment, and showing upon a plat " that even measurement which is so marked a feature

"of the range, township and section system? Clearly "not. While the contemplation of Congress may have "been that every location should be in the form of a "parallelogram, not exceeding 1,500 by 600 feet in size, "yet the purpose also was to permit the location in such "a way as to secure not exceeding 1,500 feet of the length "of a discovered vein, and *it was expected* that the locator "would so place it as in his judgment would make the "location lengthwise cover the course of the vein. *There* "*is no command* that the side lines shall be parallel and "*the requisition that the end lines shall be parallel* was for "the purpose of bounding the underground extra-lateral "rights which the owner of the location may exercise. "He may pursue the vein downwards outside the side "lines of his location, but the limits of his right are not "to extend on the course of the vein beyond the end lines "projected downward through the earth. His rights on "the surface are bounded by the several lines of his "location, *and the end lines must be parallel in order that go-*"*ing downwards he shall acquire no further length of the vein* "*than the planes of those lines extended downward inclose.* "If the end lines are not parallel, then following their "planes downward his rights will be either converging "and diminishing or diverging and increasing the farther "he descends into the earth. *In view of this pur-*"*pose and effect of the parallel end lines*, it matters not to the "prior locator where the end lines of the junior location "are laid. No matter where they may be, they do not "disturb in the slightest his surface or underground "rights."

And because they do not disturb the underground rights of the prior locator, the Court permits a second locator to go upon the land of a prior locator and erect his stakes.

**The Leading Mining Cases.**

The Court cites in this decision the cases of Flagstaff v. Tarbet; Iron Silver v. Elgin; Argentine v. Terrible; and

King v. Amy: as the great leading mining cases. There is one strange omission, one that doubtless has already attracted your Honor's attention. We do not see any thing of the Eureka case in this decision. It is not mentioned, but the cases named are the ones the Court cites as containing the gist of the law as it is to-day. The Eureka case is simply passed by. Certain portions of these cases are considered as stating the gist of the law and the Court in a general review sums up as follows:

"All that can be said to have been settled by them is, "first, *that the lines of the location as made by the locator "are the only lines that will be recognized; that the courts "have no power to establish new lines or make a new location;*"—

—and in this connection your Honor will note particularly that some of these cases referred to patents before the Act of May 10, 1872.—

"second, that the contemplation of the statute "is that the location shall be along the course "of the vein, reading, as it does, that a mining "claim '*may equal, but shall not exceed, 1,500 feet in* "'*length along the vein or lode;*' and, third, that when sub- "sequent explorations disclose that the location has been "made not along the course of the vein but across it, the "side lines of the location become in law the end lines."

It is very important to note this last proposition because it shows that these matters may be determined by subsequent explorations, as in the case at bar.

**When a Location has the Extra-Lateral Right.**

I read again from the Del Monte case:

"We pass, therefore, to an examination of the pro- "visions of the statute. Premising that the discoverer

"of a vein makes the location, that he is entitled to make "a location not exceeding 1,500 feet in length along the "course of such vein and not exceeding 'three hundred "'feet on each side of the middle of the vein at the sur-"'face,' that a location thus made discloses end and side "lines, *that he is required to make the end lines parallel, that by "such parallel end lines he places limits*, not merely to the "surface area, BUT LIMITS BEYOND WHICH BE-"LOW THE SURFACE HE CANNOT GO ON THE "COURSE OF THE VEIN, that it must be assumed that "he will take all of the length of the vein that he can, we "find from section 2322 that he is entitled to 'all veins, "'lodes and ledges throughout their entire depth, the top "'or apex of which lies inside of such surface lines ex-"'tended downward vertically.'"

Here is the summing up of the whole matter; in other words, it is a claim that is located with parallel end lines, where this right exists and in no other kind of claim.

I read again from the Del Monte case:

**Conclusions of the Court in the Del Monte Case.**

"Our conclusions may be summed up in these proposi-"tions: First, *the location as made on the surface by the locator "determines the extent of rights below the surface.* Second, "*the end lines, as he marks them on the surface*, with the "single exception hereinafter noticed, *place the limits beyond "which he may not go in the appropriation of any vein or veins "along their course or strike.* Third, every vein 'the top, "'or apex of which lies inside of such surface lines ex-"'tended downward vertically' becomes his by virtue of "his location, and he may pursue it to any depth beyond "his vertical side lines, although in so doing he enters "beneath the surface of some other proprietor. Fourth, "the only exception to the rule that the end lines of the "location as the locator places them establish the limits

" beyond which he may not go in the appropriation of a " vein on its course or strike, is where it is developed that " in fact the location has been placed not along, but " across the course of the vein."

Of course as the entire doctrine of this case is parallel end lines, therefore the word parallelism is necessarily implied in this sentence that I have last read.

I read further:

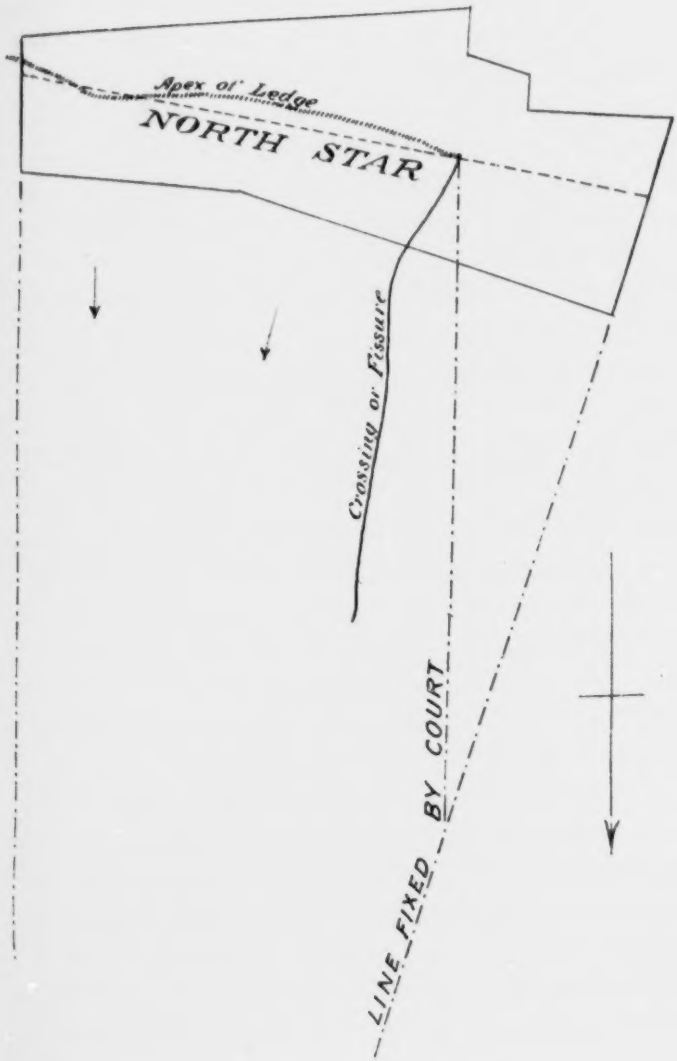
" In such case the law declares that those which the " locator called his side lines are his end lines, and those " which he called end lines are in fact side lines, and this " upon the proposition that IT WAS THE INTENT OF " CONGRESS TO GIVE TO THE LOCATOR ONLY SO " MANY FEET OF THE LENGTH OF THE VEIN, that " length to be bounded by the lines which the locator has " established as his location. 'OUR LAWS HAVE AT- " 'TEMPTED TO ESTABLISH A RULE BY WHICH " 'EACH CLAIM SHALL BE SO MANY FEET OF THE " 'VEIN, LENGTHWISE OF ITS COURSE, TO ANY " 'DEPTH BELOW THE SURFACE, although laterally " 'its inclination shall carry it ever so far from a perpen- " 'dicular.' "

Is there any provision of the law to the effect that it is the intention of the law that a man may have spreading end lines? Where is it? Parallelism everywhere from the Eureka case onward.

### The North Star Decision—How Far Approved.

The North Star case that has been referred to several times in this discussion, was approved by the Supreme Court of the United States in this Del Monte case upon the point that where the lode enters at one end line and

# Diagram I[1].


Apex of Ledge
NORTH STAR
Crossing or Fissure
LINE FIXED BY COURT

passes into the claim—for instance, supposing a claim with parallel end lines (or with converging end lines as in the North Star case) where the lode passes in at one end line and somewhere here (showing as on Diagram I[1]) in the middle of the claim it meets a crossing which cuts it off—the Supreme Court approved the North Star case in granting the extra-lateral right to so much of the vein as was included within the end lines of the location.

**Approval of the Lakin Cases by the U. S. Supreme Court.**

I am not able to say that the Supreme Court complimented my distinguished opponent in any other particular—

MR. LINDLEY. (Interrupting) It refused to issue a writ of *certiorari*.

MR. WRIGHT. I am just coming to that. The jurisdiction of the Supreme Court of the United States is limited by statute. I have in my hand here a copy of the section conferring jurisdiction in this particular class of cases. I will not read it, but simply—

MR. LINDLEY. (Interrupting) They did the same in this case as they did in the Lakin-Dolly case.

MR. WRIGHT. I beg your pardon, Mr. Lindley. Permit me to refer to the Providence case to illustrate what I mean. In the Providence case the Circuit Court rendered a decision which the Circuit Court of Appeals affirmed. A motion was made in the Supreme Court of the United States for a writ of *certiorari*. Why that writ was not granted I do not know. I think counsel himself

was very much surprised that it was not granted, because the writ is granted particularly to bring up the question of jurisdiction.

MR. LINDLEY. You are mistaken there, Mr. Wright. That is not true.

MR. WRIGHT. I know what the statute says and I say that that is the primary purpose of the writ of *certiorari*.

MR. LINDLEY. In the state courts.

MR. WRIGHT. Well, I say that it is the general rule of law, then, if counsel will have it in more general terms. The Supreme Court of the United States refused a writ of *certiorari*, and it was then supposed the Providence case was ended. Not so; for within a year counsel appealed the Providence case to the Supreme Court of the United States and there a decision was obtained, from which in a few moments I will read a few paragraphs to your Honor.

In the Lakin cases the Supreme Court—it is on the records of the Supreme Court and it is in the reports—refused both the writ of *certiorari* and *a writ of error*. Now the decisions of the Supreme Court say that the statutes on the subject of jurisdiction, and particularly the recent statutes, have been passed for the very purpose of curtailing the jurisdiction, so as to prevent the bringing of such an immense mass of material into the Supreme Court; and for that very reason that Court is very chary of issuing the writ of *certiorari*, to bring up cases that are not necessarily appealable under the statute that I have just handed to your Honor. (Sec. 6 of Chap. 517, Act of

Mar. 3, 1891, establishing Circuit Courts of Appeals.) Whether an appeal can be taken in the North Star case depends upon one thing. There was one basis for the jurisdiction and that was diverse citizenship. If there was any other basis of jurisdiction the case is appealable as of right, even after the writ of *certiorari* is refused. If an appeal has not been prosecuted by the defendant party or should not be prosecuted within the time allowed by law, then of course the case becomes *res adjudicata*. But can it be said that the Supreme Court of the United States has in any way or manner either directly or by implication made that case the law of the land? Clearly not. I asked counsel on Monday the question as to whether there was any ground of jurisdiction other than the question of citizenship and he said there was.

MR. LINDLEY. In what case was that?

MR. WRIGHT. In the North Star case. My question was asked for the very purpose of ascertaining whether there was any ground of jurisdiction except the citizenship.

MR. LINDLEY. I did not answer any such question in the affirmative, because there was not.

MR. WRIGHT. I certainly so understood you and I think the minutes will show it.

MR. LINDLEY. The record simply will show that it was a plain ordinary action in ejectment and that one party was a resident of the State of Nevada and the other a resident of the State of California.

MR. WRIGHT. Then the only way that matter could be taken up to the Supreme Court would be by a writ of

*certiorari* but the fact that the Supreme Court refused the writ of *certiorari* would be no proof that it approved the law of that case.

MR. LINDLEY. I did not contend that it did. I simply stated that it refused the writ of *certiorari* exactly upon the same ground that it placed its decision in the Dolly case, which was a proceeding just like it.

MR. WRIGHT. Was the order the same?

MR. LINDLEY. The order was the same except that in the Lakin v. Dolly case the petition was for a writ of error and of *certiorari*, and the Supreme Court denied them both because a writ of error in the first place did not lie in any possible light.

MR. WRIGHT. When it refused the writ of *certiorari* in the Lakin-Dolly case, a writ of error would lie and the Supreme Court refused that for the simple reason that if it brought up the case on a writ of error it would have been compelled to immediately dismiss the writ because of its approval of the doctrines of the case.

MR. LINDLEY. A writ of error never lies, if you permit me to make a statement to correct your statement of yesterday, because it was so erroneous.

MR. WRIGHT. Well, it is on the record and I am willing to stand on it.

MR. LINDLEY. Well, I simply want to straighten out both ourselves on this proposition. No writ of error lies out of the Circuit Court of Appeals to the Supreme Court of the United States in a case where the jurisdiction is acquired by reason of the diversity of citizenship.

MR. WRIGHT. I have stated that.

MR. LINDLEY. You stated that in the Lakin-Dolly case a writ of error went to the Supreme Court of the United States and for that reason they had jurisdiction to pass upon the decision of the Circuit Court of Appeals, and that is not so.

MR. WRIGHT. I say so now. I say the decision of the Supreme Court of the United States is that it refused a writ of error in that case. Now the language of the statute is as follows: Let us see what is right and what is wrong. (Reading from Sec. 6, Chap. 517, Act of March 3, 1891, establishing Circuit Courts of Appeals)

"In all cases not hereinbefore in this section made "final there shall be of right an appeal or writ of error "or review of the case by the Supreme Court of the "United States where the matter in controversy shall "exceed $1,000 besides costs."

And so in the case of Lakin v. Dolly, it was a matter of right, and counsel is not in a position to dispute the fact; and I say that the refusal of a writ of error has made that case the law of the land, and I challenge your Honor's investigation on that point.

Now I have just this morning looked up the date of the decision of the North Star case by the Circuit Court of Appeals, and I find it was rendered on the 18th day of October, 1897, consequently, unless an appeal or writ of error has been prosecuted, the case from any point of view is now *res adjudicata*. But that does not make it the decision of the Supreme Court of the United States.

**Converging End Lines.**

I am not going to advance any further opinion on the subject of the end line decision in the North Star case. I say, however, that the statute regarding parallelism of end lines is mandatory. I say that that doctrine permeates the Del Monte case through and through and I say that converging end lines are not parallel end lines. I do not suppose there is anybody here that will have the hardihood to dispute that, and if the rule is mandatory, it applies there. But this is not the first time I have admitted, and probably it will not be the last, that where the end lines converge in the direction of the dip of the lode, the reason for the rule ceases and therefore the North Star decision may be right, and may finally be upheld by the Supreme Court of the United States.

MR. LINDLEY. In the North Star case the end lines were converging.

MR. WRIGHT. Yes, they converged in the direction of the dip of the lode, therefore in going down into the ground the miner would not get more than he had at the surface.

Now the actual decision in the North Star case was that—if your Honor will follow the motion of my hands—(illustrating as shown on Diagram I[1]) in the middle of the claim the lode was stopped by a crossing and at that point a line was drawn parallel to the end line through which the lode passed. The owner was allowed by the decision to continue on down until he got to the other end line, which was converging, and that is exactly the

doctrine advocated by me in the Wyoming case.

MR. LINDLEY. The doctrine was conceded by both parties in the Wyoming case.

MR. WRIGHT. Well, then, the Court gave me more than I asked for in the Wyoming case, as to the Ural.

**The Providence Case in the Supreme Court.**

I would like to have from you (turning to Mr. Lindley) your Providence map, if it is convenient.

(Counsel produces map, similar to Diagram 8).

Now just a few comments on the Walrath v. Champion case, 171 U. S.—which is the last of these great cases decided by the Supreme Court of the United States. The gist of this matter was stated to your Honor by Judge Lindley. The end lines are here. Here is one, and here is the other (showing lines a—p and g—h). The matter in dispute was that portion of the contact lode that underlies this triangle $g^1$—g—$h^2$. This part of the claim was out here (showing h—i—k—$h^1$). And the question was, what extra-lateral rights attach to this segment of the contact lode (showing) found within the lines of the claim. This was a patent under the Act of 1866, a patent granted before the act of May 10, 1872, was passed, and it is therefore an extreme case. We contend it could not be governed by the same principles as the case at bar.

**The Intent of the Acts of 1866 and 1872 the Same as to End Lines and Side Lines.**

After citing the facts of the case, the Court, speaking by Mr. Justice McKenna, quotes with approval the main

provisions of the Flagstaff case. I shall not read all the Court quotes because I have already read it to this Court myself. The Court say: (reading from the Providence case)

"Commenting on the instructions, Mr. Justice Bradley, "speaking for the Court, said:

"'These instructions and refusals to instruct indicate "'the general position taken by the court below, namely, "'that a mining claim secures only so much of a lode or "'vein as it covers along the course of the apex of the "'vein on or near the surface, no matter how far the loca-"'tion may extend in another direction.'

"And after stating that the Act of 1872 was more ex-"plicit than that of 1866, BUT THE INTENT OF BOTH "UNDOUBTEDLY THE SAME AS IT RESPECTS "LINES AND SIDE LINES, AND THE RIGHT TO "FOLLOW THE DIP OUTSIDE OF THE LATTER, "he proceeded as follows:"

Now your Honor will perceive that the Supreme Court here takes it for granted that the meaning of the two statutes is the same as to end lines and side lines and the right to follow the lode outside of the side lines.

Then follows the quotation from the Flagstaff decision that I have already read to your Honor, and after that the following, which we consider very significant and important:

"This law was followed and applied in Argentine Min-"ing Company v. Terrible Mining Co., 112 U. S. 478; and "in Iron Silver Mining Company v. Elgin Min. & S. Co. "118 U. S. 222. *The locations passed upon in these cases were "made under the Act of 1872, but we have seen that the intent "of that Act and the Act of 1866, 'as it respects end lines and "side lines,' was the same.*"

Now, if your Honor please, it is singular that counsel can come into this presence and advance his position in the case at bar, knowing, as he must, that what I have read is the final adjudication of the Court of last resort on these points. I repeat:

"THE LOCATIONS PASSED UPON IN THESE "CASES WERE MADE UNDER THE ACT OF 1872. "BUT WE HAVE SEEN THAT THE INTENT OF "THAT ACT AND THE ACT OF 1866, 'AS IT RE- "'SPECTS END LINES AND SIDE LINES,' WAS "THE SAME."

I read further:

"But appellant urges that 'those cases are not in point "'here.' We think that they are. The patent in the Flag- "staff case appears to have been the same as here, and "besides, WHATEVER THE PATENT HERE, IT "MUST BE CONFINED TO THE RIGHTS GIVEN BY "THE STATUTE WHICH AUTHORIZES IT.

"In the Flagstaff case the lode was claimed, and hence "the right to follow it beyond the surface boundaries of "the location was claimed. Here the lode is claimed and "the right to follow it outside of the surface boundaries, "that is, beyond the line f—g, to the point $x^1$."

(Query: $X^1$ or $Z^1$ ? J. M. W.)

That is to say, the Providence people claimed the right to follow this lode (showing) outside of this line (showing line g—h on map), outside of the end line planes.

MR. LINDLEY. Outside of the original end lines.

MR. WRIGHT. (Continues reading) "In that case "the right contended for was denied on the principle "applicable to end and side lines. In this case, the right "contended for must be denied by the application of the "same principle."

I think there can be no question that the Supreme Court in this case, which is the first time lately it has had a chance to say a word about patents under the law of 1866, intends to make it clear that it holds to the ruling that as to extra-lateral rights, the rule is the same under both statutes. It says so. It must mean it.

MR. LINDLEY. May I ask you a question? Doesn't Judge McKenna, at the end of that very proposition, reserve the decision on the proposition of end lines under the Act of 1866?

MR. WRIGHT. Well, I will read that in a moment. I can not read all this case in a second.

MR. MCGEE. It seems you forgot to read the last part of it.

MR. WRIGHT. I have forgotten nothing, and I have refused to read nothing, and I have neglected to read nothing; and I may say, that if there is a suggestion on the part of either of the counsel that there is any lack of candor in my discussion, the suggestion comes from the character of his own mind and not from any conduct of mine in this presence.

I will not read this entire Providence case, because of course your Honor will read it all.

**Reserved and Indicated Opinions of the Supreme Court.**

This decision is divided into two parts, and in the last portion there is a discussion as to the ownership of the lode underneath this segment of ground, which I am now indicating by pointing (showing figure h—i—k—$h^1$ on

map). In other words, it is a segment of ground lying outside the line which the Court has determined to be the end line, but this little segment is a part of the surface ground granted under the patent.

MR. LINDLEY. That is simply that small part up there.

MR. WRIGHT. Yes, outside of this line (showing line g—h—$h^1$—$h^2$ on map) which is the end line. The Court says:

"The right to that portion of the contact ledge within "the boundaries of the parallelogram h—i—k—$h^1$ pre- "sents an interesting question. It does not appear to "have been submitted to either of the lower courts, but "the right by the decree of the Circuit Court is given to "appellee by adjudging to it that portion of the vein on "its dip which lies north-easterly of the line g—h and its "continuation.

"The question is a new one in this Court, but we think "it is determined by the principles hereinbefore laid "down. It may be true that under the Act of 1866 the "patenting of the Providence mine in its irregular shape "was in all respects legal and proper, and that the act "did not require the location to be made in the form of "a parallelogram or in any particular form, and that "there was no requirement that the end lines should be "parallel. It is also true that under that act only one "vein could be included in a location, no matter how "much surface ground was included in the patent, but "that under the act of 1872 possession and enjoyment of "all the surface included within the lines of their loca- "tion and of all veins, lodes, and ledges throughout the "entire depth, the top or apex of which lies inside of such "surface lines extended downward vertically, were given.

"But rights on the strike and on the dip of the original "vein and rights on the strike and on the dip of the other "veins, we have decided, are determined by the end lines

"of the location. In other words, it is the end lines alone, "not they and some other lines, which define the extra- "lateral right, and they must be straight lines, not "broken or curved ones. The appellant, under his "contention, would get the right such lines would give "him and something more besides outside of them. To "specialize, he would get all within a plane drawn "through the line g—h, and all within the planes drawn "through the sides of the parallelogram h—i—k—$h^1$.

"It may be that the end lines need not be parallel "under the act of 1866; may converge or diverge, and "may even do so as to new veins, of which, however, we "express no opinion, but they must be straight—no other "define planes which can be continuous in their own di- "rection within the meaning of the statute. It may be "that there was liberty of surface form under that act, "but the law strictly confined the right on the vein below "the surface. There is liberty of surface form under the "act of 1872. It was exercised in Iron Silver Mining Co. "v. Elgin Mining & S. Co., *supra*, in the form of a horse- "shoe; in Montana Co. Limited v. Clark, 42 Fed. Rep. 626, "in the form of an isosceles triangle."

Now, if the Court please, if there is any comfort for the gentlemen in this, they are welcome to it. The very last expression is parallelism. The statute said 200 feet—no more than two hundred feet to each locator. Is this high Court going to say that they might have more and thereby nullify the statute? Judge Field said that the most important provision of the old rules was that there should be no increase as you go down into the earth, and the Supreme Court here says, "The law strictly confined the "right on the vein below the surface."

**Irregularity of Surface Form Permitted by Both Statutes.**

I desire to call your Honor's most earnest attention to this subject of form, and I shall repeat again what the Court says here:

"IT MAY BE THAT THERE WAS LIBERTY OF "SURFACE FORM UNDER THAT ACT" (THE ACT OF 1866) "BUT THE LAW STRICTLY CONFINED "THE RIGHT ON THE VEIN BELOW THE SUR- "FACE. THERE IS LIBERTY OF SURFACE FORM "UNDER THE ACT OF 1872."

If your Honor please, there is no question that this language is placed here, in the very last paragraph of the very last decision, for the purpose, if you please, of preventing the *obiter dictum* in the Elgin case from doing any more harm than it has already done, by misleading counsel in a few instances, and the Courts in still fewer instances, into the belief that because a location was made prior to May 10, 1872, all jurisdiction of the Land Department was taken away, and that a party might take not only what the law gave him but what he chose to ask for. That is the claim, not merely what the law gave him, but what he chose to ask for; and the Court says that "*it may be*" that *these surface locations* were all right *so far as the surface goes;* but it clearly means to give out the warning that just as the two statutes are alike in respect of permitting surface locations to be made in irregular shape, it has also determined that as to end lines and side lines, the law under both statutes is the same.

*(At this point, a recess was taken in this case until 2 o'clock this afternoon, when Mr. Wright resumed his argument as follows):*

**The Important Mining Decisions.**

There is one feature of the Providence case that I have neglected to call to the attention of the Court. It is the same, however, that was called to the Court's attention this morning in the Del Monte case; that is to say, the Court in recapitulating for the second time the important mining cases, the cases that make the law, for some reason—a reason I think I have already explained—does not mention the Eureka case as one of the controlling cases.

Your Honor is aware of the fact that formerly, before these matters came to be better understood, the Eureka case was almost always mentioned. Especially has it been numerously cited upon the broad lode question, but for the second time the Supreme Court, for reasons of its own, has neglected to mention the Eureka case as one of the great cases showing what the mining law is to-day.

**A Party Failing to Secure the Extra-Lateral Right Must Blame Himself.**

In closing the remarks I wish to make upon this particular question, I will ask the indulgence of the Court while I read a few thoughts from different decisions that bear, as I think, on this subject. This will be a very brief reading and I shall not, to any considerable extent, analyze these decisions. I wish to read first a few of the re-

marks of Judge Hallett in the Court below in his decision of the Elgin case. Some of his remarks are extremely pertinent here.

In Elgin Mg. & S. Co. v. Iron Silver Mg. Co., 14 Fed. 377, after stating the case and after describing the Stone, or "horse-shoe," claim, Judge Hallett says:

"And so it appears that eastward and southward from "the northwestern end of the claim, there is no line "which can be recognized as an end line, and the claim "has but one end line, or perhaps none whatever.

"This view was not controverted at the hearing but it "was said that: 'End lines may be a matter of legal in-"'ference and deduction from established facts to control "'even the act of the locator of the claim. As the law "'requires that a location shall be made along the course "'or strike of a vein at the surface of the earth, the end "'lines must of necessity be at right angles to the course. "'And whenever the course or strike can be ascertained "'at the point where it passes from the location, end lines "'should be fixed at right angles thereto, without ref-"'erence to the end lines laid in the location.'

"To apply this rule to defendant's claim, lines should "be drawn parallel to each other at each end, and where "the out-crop of the vein is said to pass out of the loca-"tion, and in the general direction east and west, the "strike of the vein being north and south."

Your Honor will notice that this discussion was carried right along from the time of the Eureka case up to the time of the discussion in the Elgin case.

"The circular form of outcrop is thought to be the "result of erosion in California Gulch, which comes down "through the middle of the claim, and at some remote "time the outcrop may have extended directly across the

"gulch between the ends of the claim, so as to admit of "a location in the usual form with end lines, as now pro- "posed to be laid, in the general direction east and west. "It is contended that in the location of a claim, "which must of necessity be made before the "strike of the lode can be ascertained, it is too "much to expect the locator to lay his end lines in the "proper direction, and locations made at various angles "of divergence from the strike of the lode are cited to "illustrate the fact that by a slight deviation from the "proper course the object of making the location may be "defeated. This, however, is only to say that it is diffi- "cult to make a good location of a mining claim when the "situation of the ore is unknown, and that if the locator "fails to lay his claim so as to secure the ore, the law "should correct his mistake. Plainly enough, the law re- "quires the locator to fix the boundaries of the claim, of- "fering the bounty of the government to the extent of the "public domain from which to make the best possible se- "lection. If the locator fails to choose wisely and well, the "failure is with him, and it cannot be imputed to the law. "*There is no greater reason for saying that the end lines* "*shall be established by inference and presumption from* "*the course of the lode, than that the side lines shall be* "*so established.* The rule of the early miners' law, which "obtained in some mining districts before the statute was "enacted, was of the character which we are now asked "to adopt. By locating on the vein the miner secured "the number of feet allowed him, wherever it might "extend, with surface ground adjacent, and, of course, "the boundaries of the claim could only be known from "the course of the lode. By the Act of Congress that rule "was changed, and it was required that the boundaries "of the claim shall be marked on the ground, and end "lines and side lines are referred to in a way to show that "they must be laid down with care. Under such a stat- "ute it cannot be necessary to discuss at length the "power of the Court to establish lines by construction, "for no such power can exist. The end lines established

"by the locator must control, and if absent, or if so "placed as not to define the right of the locator to the "exterior parts of the lode, the defect cannot be "supplied.

"In that case the location may be valid for all that can "be found within the surface lines, but beyond those "lines an essential element of the right to follow the lode "is wanting, and therefore the right cannot exist. With "some information as to the situation of the ore, and the "law relating to the subject, the end lines of the Stone "claim could have been laid as it is now said they should "be placed, and the failure to do so was owing to ignor- "ance of facts necessary to intelligent action. *It presents "the common case of failure to obtain property through "a mistake of fact or law, for which the party seeking "the property is alone responsible. Against such error and "misfortune the law does not relieve.*"

Now we simply claim that it is the misfortune of these people in the case at bar, that they did not, after the passage of the act of 1872, come into the Land Office and so comply with the provisions of the statute as to get the extra-lateral right.

In the case of McCormick v. Varnes, 2 Utah 355, 9 M. R. 505, it is said:

"Unfortunately for the Appellant, the locators of the "Flagstaff mining claim mistook the direction of the vein "and made their location across it instead of along its "general course or strike. The Court can grant no relief "from the consequences of this mistake. *No vein is guar- "anteed by the government to those who shall apply for "a patent*, but simply promises a patent to such as go upon "and explore the public domain, and having made such "exploration, represent to the government what they "claim to have discovered and where it is located.

"*The miner is left free to make his choice of location as he "sees fit, and ample opportunity is given him to determine the*

"*situation of his lode or vein. If he makes this choice with-*
"*out sufficient exploration to guide him in making the location,*
"*the blame rests upon himself.*"

I will also quote a few remarks from the case of Watervale v. Leach, 33 Pac. 421:

"Of course, Congress expected that the miner would "avail himself of *the privilege* accorded him and locate "along the course of the lode, *but it does not require him to* "*do so.*"

**The Patented Lines Control.**

There is an important remark in the North Star case by Judge Beatty, who, as I have stated to your Honor, is an earnest advocate of the old doctrine that the law should be so that the end lines might be drawn through the end points of the location. He says in Carson City v. North Star, 73 Fed. 597:

"In this objection are involved the questions of the "parallelism, and of the intersection by the ledge, of the "end lines of the original locations. When those loca-"tions were made, there was no law requiring such paral-"lelism, but, independent of all lines, the right to follow "the ledge along its course for the full distance claimed, "and underground upon its true dip to any depth, was "undisputed. Although section 9 of the Act of 1872, in "repealing certain parts of the old law, provided that "'such repeal shall not affect existing rights,' *the courts* "*have held that, when any claim is patented, those rights are* "*controlled by the patented lines.*"

**The Statutes Merely Definitive.**

I also quote from the case of Broder v. Natoma Water and Mining Co., 101 U. S. 274:

"We are of opinion that it is the established doctrine "of this Court that rights of miners, who had "taken possession of mines and worked and devel- "oped them, and the rights of persons who had "constructed canals and ditches to be used in "mining operations and for purposes of agri- "cultural irrigation, in the region where such artificial "use of the water was an absolute necessity, are rights "which the government had, by its conduct, recognized "and encouraged and was bound to protect before the "passage of the act of 1866, and that the section of the "act which we have quoted was rather a voluntary *recog-* "*nition of a pre-existing right of possession*, constituting a "valid claim to its continued use, than the establishment "of a new one. This subject has so recently received our "attention, and the grounds on which this construction "rests are so well set forth in the following cases, that "they will be relied on without further argument: Atch- "ison v. Peterson, 20 Wall. 507; Basey v. Gallagher, 20 "Wall. 670; Forbes v. Gracey, 94 U. S. 762; Jennison v. "Kirk, 101 U. S. 240."

Your Honor will notice here that this is simply a repetition of the rule that the act of 1866 merely confirmed the rights of miners, and the act of 1872 merely followed up the act of 1866 in making it more definite.

**The Principles Decided by the Providence Case.**

I have prepared a recapitulation of what is decided in the Providence case, and at the risk of repetition I will go over a few words of what I have already read from that case.

After quoting voluminously from Flagstaff v. Tarbet, 98 U. S. 463, as showing "the extent of the right passing "under the act of 1866," the Court says:

"This law was followed and applied in Argentine Min-
"ing Company v. Terrible Mining Company, 122
"U. S. 478; and in Iron Silver Mining Company
"v. Elgin Min. & S. Co., 118 U. S. 196; King v.
"Amy and Silversmith Consol. Min. Co., 152 U. S. 222.
"The locations passed upon in these cases were made
"under the Act of 1872, BUT WE HAVE SEEN THAT
"THE INTENT OF THAT ACT AND THE ACT OF
"1866, 'AS IT RESPECTS END LINES AND SIDE
"'LINES' WAS THE SAME.

"But appellant urges that 'those cases are not in point
"'here.' We think that they are. The patent in the Flag-
"staff case appears to have been the same as here, and be-
"sides, whatever the patent here, it must be confined to the
"rights given by the statute which authorizes it. In the
"Flagstaff case the lode was claimed, and hence the
"right to follow it beyond the surface boundaries of the
"location was claimed. Here the lode is claimed and the
"right to follow it outside of the surface boundaries, that
"is, beyond the line f—g to the point $X^1$. In that case,
"the right contended for was denied on the principle ap-
"plicable to end and side lines. In this case, the right
"contended for must be denied by the application of the
"same principle."

Here is an explicit ruling that the principles applicable to the end lines of locations made under the law of 1866 are the same as those applicable to the end lines of locations made under the law of 1872. But, as if fearing the above might be misunderstood, the Court in the last paragraph of the decision, says:

"It may be that the end lines need not be parallel
"under the act of 1866; may converge or diverge, and
"may even do so as to new veins, of which, however, we
"express no opinion, but they must be straight—no other
"define planes which can be continuous in their own

"direction within the meaning of the statute. It may be "that there was liberty of surface form under that act, "but the law strictly confined the right on the vein below "the surface. There is liberty of surface form under the "Act of 1872. It was exercised in Iron Silver Mining Co. "v. Elgin Mining & S. Co. *supra*, in the form of a horse-"shoe; in Montana Co. Limited v. Clark, 42 Fed. Rep. 626, "in the form of an isosceles triangle."

Here four propositions are made clear. (1) The liberty of surface form allowable in locations made under the law of 1866 had no other or greater significance than that under the law of 1872; (2) "The law "strictly confined the right on the vein below "the surface" under the law of 1866 as well as under the law of 1872. And this is tantamount to Judge Field's assertion in the Eureka case, 4 Sawy. 322, that "no construction is permissible which would sub-"stantially defeat the limitation of quantity on a ledge, "which was the most important provision in the whole "system of rules." (3) The lines bounding extra-lateral rights must be straight in all cases, whether of locations under the law of 1866 or of 1872. (4) Under both statutes the mining right is bounded by straight parallel end lines.

This fourth proposition may be modified in this form: Under both statutes the mining right is bounded by straight parallel end lines or by straight converging end lines.

MR. LINDLEY. Is that your language, Mr. Wright?

MR. WRIGHT. Yes, that is my language and the Court so understands it. These principles necessarily follow

from the provisions of the two statutes. The law of 1872 says, "the end lines of each claim shall be parallel to "each other." The law of 1866 says, "no location here-"after made shall exceed 200 feet in length along the "vein for each locator, * * * with the right to fol-"low *such* vein to any depth." The one provision is equally mandatory with the other.

Now, I say without fear of successful contradiction, that under these laws, under each of these laws, the end lines must, in the first place, be straight; secondly, under the provisions of each statute, either they must be parallel or they must converge, because each statute is mandatory in saying the locations made under it may equal but shall not exceed a certain amount on the lode.

**The Effect of Diverging End Lines. Mr. Lindley's Illustration.**

It is to me, your Honor, indeed singular that I must contend for the principle of parallelism of end lines, not with, but against the counsel who opened this argument. I have read with the greatest admiration his arguments in the Circuit Court and the Supreme Court, respectively, in the Providence case. No man has presented a more powerful argument, than has the distinguished counsel, against the divergence of end lines in the direction of the dip of the lode, and I do not fear that I shall weary the Court by repeating his language.

MR. LINDLEY. Under the Act of 1872.

MR. WRIGHT. Well, we will see how it comes out.

# Diagram $D^1$.

MR. LINDLEY. Before the Supreme Court of the United States, it was conceded by both counsel that under the Act of 1866 divergence of end lines was possible; I think the brief of both sides will show that.

MR. WRIGHT. Well, I don't know what was conceded verbally in the Supreme Court excepting as the counsel states it.

MR. LINDLEY. It is on the record.

MR. WRIGHT. But *in the record made by counsel* is a most powerful argument and I would like to use it here. I am sure counsel cannot object to my presenting *his own view*, when I read *from his own brief*, on page 22 of the brief filed by Mr. Lindley in the Supreme Court of the United States in opposition to the issuance of a writ of *certiorari* in the case of Walrath v. Champion Mining Company. (Reads from the brief and illustrates from Diagram D[1].)

"In figure 6 (see next page) we have the Providence "location A with the contact ledge $X^1$—$X^2$ crossing the "line f—e at an assumed point X, and extending on its "course through an assumed location D.

"There was some evidence introduced at the trial tend- "ing to show that the ledge passes out of the line f—e "approximately at the point X. But we are now dealing "with this as an hypothesis.

"The location 'D' is under the Act of 1872, and, of "course, junior in point of time to 'A.' D is a regular "valid location, covering fifteen hundred feet of the apex "of the ledge X—$X^1$—$X^2$. The end lines are parallel to "each other and crosswise of the lode.

"If the petitioner's theory is correct, that his northerly "bounding plane is to be drawn through f—g—$g^1$, it fol-

" lows as a corollary that the same rule is to be applied to " the crossing on the line f—e at X. He will, therefore, " have all the segment of the contact ledge lying between " vertical planes drawn through the lines f—g—$g^1$ and " f—e—k—$e^1$, and those lines produced indefinitely.

" Say the length of the ledge X—$X^1$—$X^2$ within the " surface lines of his location f—g and f—e is 700 feet, " the dip being in the direction of the arrows. Petitioner " follows the ledge on its downward course between ver- " tical planes drawn as above stated.

" When he reaches 2,000 feet in depth on the downward " course of the vein, he has *five thousand linear* feet of the " ledge between the points $g^1$ and $e^1$ with a surface *apex* " of only 700 feet. 'D' who has a regular valid location, " with 1,500 feet of the apex, could on plaintiff's theory " take nothing below the plane drawn through e—k—$e^1$.

" Can petitioner seriously contend that Congress in- " tended to grant him any such extraordinary rights?"

## Application of the Lindley Illustration.

Now, I will make myself responsible for the following language. I have followed his conclusions——

MR. LINDLEY. (Interrupting) May I just interrupt you a moment?

MR. WRIGHT. Will you permit me to finish this and then you can make your comment.

MR. LINDLEY. I simply wish to suggest that the nature of this——

MR. WRIGHT. (Interrupting) I know the nature of it just as well as you. I am simply using this in my own way for my own purpose.

Now let *us* suppose *here*, that the figure " A " represents a location made, if you please, *under the law of*

*1866.* Let us suppose further, that the lode $X—X^1—X^2$ *is the only lode found within the claim*, the lode "expressed in "the patent," as the statute puts it. Now *that* is *our* supposition *here*. Now let us apply the test of this illustration to the Pioneer case. According to Mr. Lindley's present contention, and using his own language—that is to say, according to his contention in the case at bar, and using his own language—"When he" (the owner of the claim A) "reaches 2,000 feet in depth on the downward "course of the vein, he has *five thousand linear* feet of the "ledge between the points $g^1$ and $e^1$ with a surface apex "of only 700 feet."

Two thousand feet, if your Honor please, is only a moderate depth in these localities.

I quote Mr. Lindley again when *I* ask *him*, "Can he "seriously contend that Congress intended to grant him "any such extraordinary rights?"

How can he so contend against a statute mandatory in providing that no more than a given number of feet of the ledge shall be located,—against the entire body of miners' rules in all the districts throughout the states of the Pacific Coast,—against the decision of the Circuit Court that, "NO CONSTRUCTION IS PERMISSIBLE "WHICH WOULD SUBSTANTIALLY DEFEAT THE "LIMIT OF QUANTITY ON THE LEDGE,"—and "against the decision of the Supreme Court of the United "States that "THE LAW" (OF 1866) "STRICTLY "CONFINED THE RIGHT ON THE VEIN BELOW "THE SURFACE," AND THAT THE END LINES "'MUST BE STRAIGHT'"

MR. LINDLEY. Now, may I ask you a question, Mr. Wright.

MR. WRIGHT. Yes, sir.

MR. LINDLEY. Isn't it a fact that in the Providence case the only right the Providence had to that lode was by virtue of the act of 1872?

MR. WRIGHT. Yes, sir.

MR. LINDLEY. And that the illustration of the argument is simply upon the force and effect of the act of 1872?

MR. WRIGHT. I have illustrated it and I think the Court understands the illustration. My argument is based on the hypothesis that this was *the only lode located, the only lode within these boundaries.* (To the Court) The argument certainly shows Mr. Lindley's rule in the extreme. It is a matter easy of calculation by the Court in the case at bar to determine how much would be gained by the owner of the Pioneer claim going down in depth say 2,000, 3,000, 4,000, 5,000 or 6,000 feet. That is very easy for the Court to determine. But here we have an easy illustration where we only have 700 feet on the lode. Mr. Lindley would necessarily he here contending that at the depth of 2,000 feet his client should have 5,000 feet of the lode.

MR. LINDLEY. Under the act of 1872 we would have—

MR. WRIGHT. (Interrupting) Would you have it under any act, as you contend? Under *any* act? I am drawing an exact parallel, the only difference being, if your Honor please, that in this case used for illustration,

the divergence between the end lines is greater than it is in the case of the Pioneer.

THE COURT. At what angle was it, Mr. Wright?

MR. WRIGHT. The divergence in the case of the Pioneer is 14 degrees and 45 minutes.

**Review of Defendant's Objections Continued.**

Now, if your Honor please, I do not care to make any further remarks upon these particular objections. It is, however, my duty to briefly recapitulate the remainder of the objections. These objections I have just discussed, were 21 and 22. Your Honor of course understands that this argument is intended to apply to the reasons enumerated in the printed record in 1408, as "a", "b", "c", "d" and "e" on pages 79 to 85.

The next objections are found on page 86, objections 23 and 24. The argument that has just been completed will necessarily be understood to apply to objections 23 and 24, it being certain, of course, that if the patent is not competent evidence to prove the *locus in quo*, then no testimony relative to the ore actually extracted could be held to apply to the patent, which is the only title that is set up by the plaintiff, and therefore this testimony would not be competent to prove anything set up in the complaint. The argument will of course apply to the reasons given or enumerated as reasons "a," "b," "c," "d" and "e" on pages 87 to 94.

**The Complaint not Demurrable.**

I desire to make a few remarks and illustrations that will apply to the complaint.

The complaint unquestionably sets up a cause of action, inasmuch as it alleges the ownership of that segment known as Lot No. 48. It undertakes also to set up the ownership of an extra-lateral right, and the allegation as to the trespass is, in effect, that the defendant has trespassed on all the property named in the complaint—that is the substance of the allegation—therefore it might be that the defendant had trespassed upon Lot No. 48 and therefore it is clear that there was a cause of action and the complaint was not demurrable. I take it that that is probably the reason—it was the only reason I could see—why the Circuit Court of the United States remanded this case to the state court. Because, if we had gone within this segment, a federal question was not necessarily involved, as it would have been no more than an ordinary trespass, a mere question as to whether we were in this ground or not. According to the complaint we might have trespassed under this ground of the plaintiff, and therefore it must be admitted that the Circuit Court was right in remanding the causes to the State Court.

I think it is proper for us to illustrate reasons "d" and "e" found on pages 83 to 85 and reasons "d" and "e" found on pages 92 to 94.

The averment in the complaint of an extra-lateral right is of 1589 $^{94}/_{100}$ linear feet of the lode throughout its en-

tire depth. This would be a complete and perfect averment of the extra-lateral right *if the end lines were parallel.* I think that in all the cases I have seen, similar language has been used, but in every other case where I have noticed this language, the end lines of the location were parallel, so that the averment covered all the lode between the end lines extended.

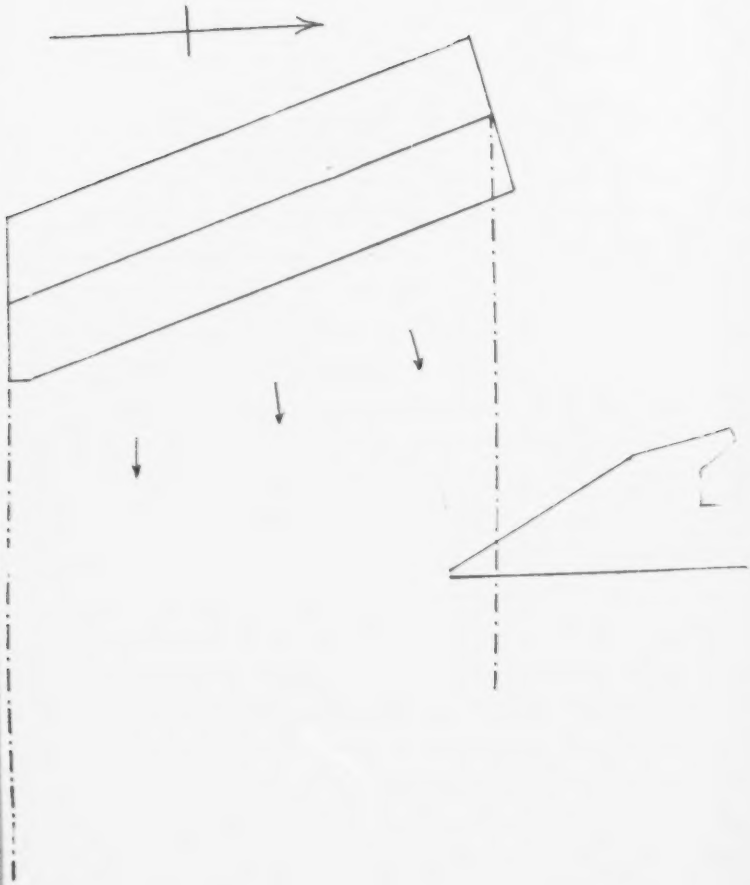
**Diagrams Illustrating the Argument and Showing the Defects of the Complaint and the Patent.**

Our answer to this complaint is that, while the end lines diverge, the allegation is of only 1589 $^{94}/_{100}$ linear feet, and therefore we say, and we insist upon the objection, that it is impossible to tell from this complaint whether the ore that has been taken out was within any segment of the lode alleged in the complaint or not. In other words, we say that no segment of the lode has been alleged.

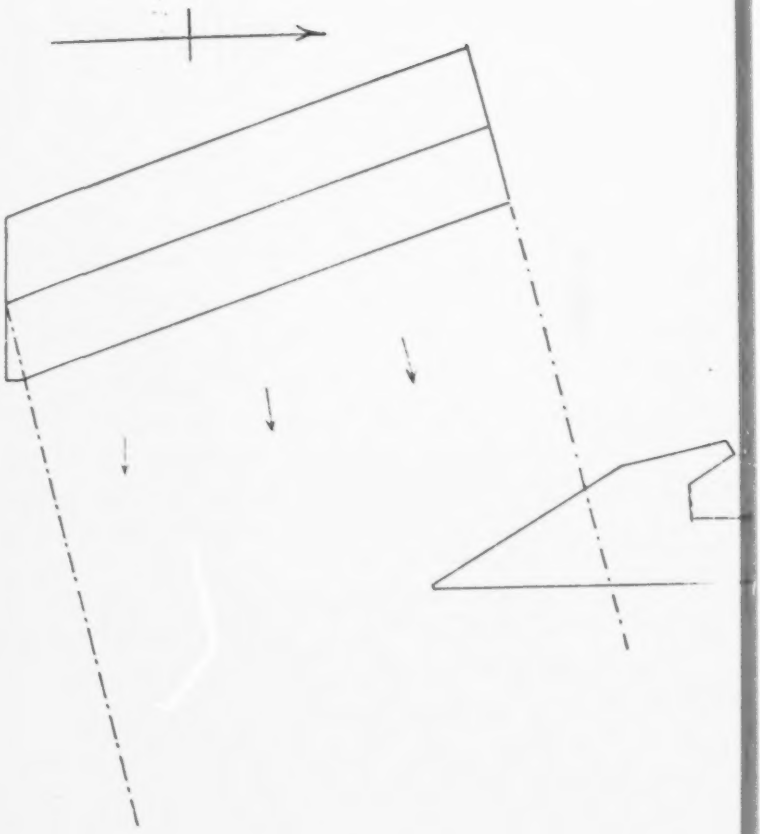
I have here some diagrams which I desire to exhibit to the Court illustrating some of the matters discussed in my argument. This diagram (referring to Diagram A) represents a segment of 1589 $^{94}/_{100}$ feet of the lode paralleling the south end line. There is no other purpose in using this except to illustrate the lackings of the complaint.

The next is Diagram B. Your Honor will notice that it represents a segment of 1589 $^{94}/_{100}$ feet of the lode paralleling the north end line. "A" and "B" illustrate the reason "d" for objection 24 on pages 92-93.

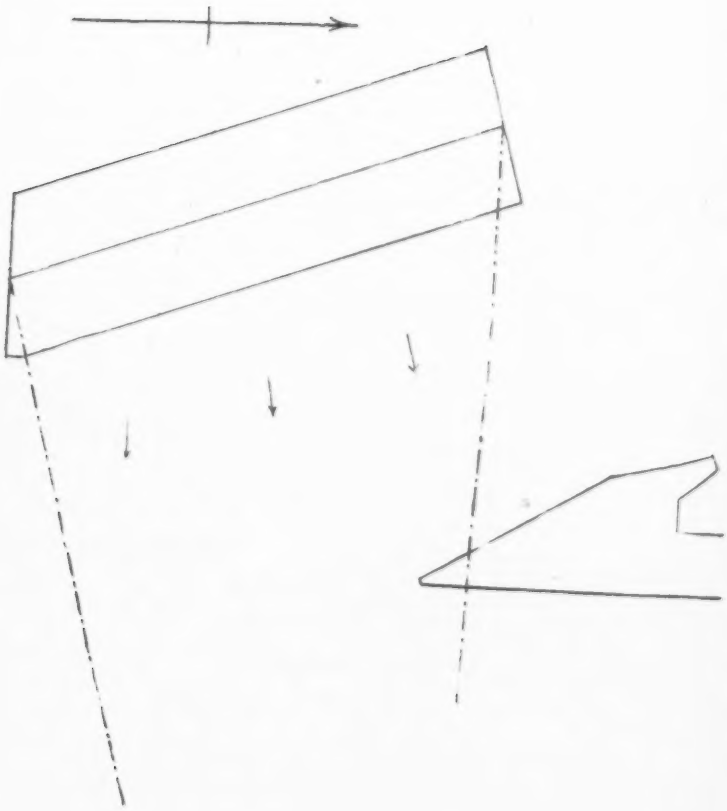
# Diagram A.



# Diagram B.



# Diagram C.



Here is a plat (referring to Diagram C) showing the north end line paralleling the south end line of Lot No. 48 and the south end line paralleling the north end line. Your Honor sees these are converging. I shall have something to say a little further on about this when I present another illustration.

MR. McGEE. Mr. Wright, do you claim that the complaint does not disclose the fact that the end lines are divergent?

MR. WRIGHT. That it does not disclose that fact?

MR. McGEE. Yes.

MR. WRIGHT. I have asserted at numerous times that it does disclose it. In every way that it is possible to state it, I have stated that fact.

THE COURT. What was the question?

MR. McGEE. My question was whether he contended that the complaint in this action did not disclose that the end lines of the Pioneer claims are diverging.

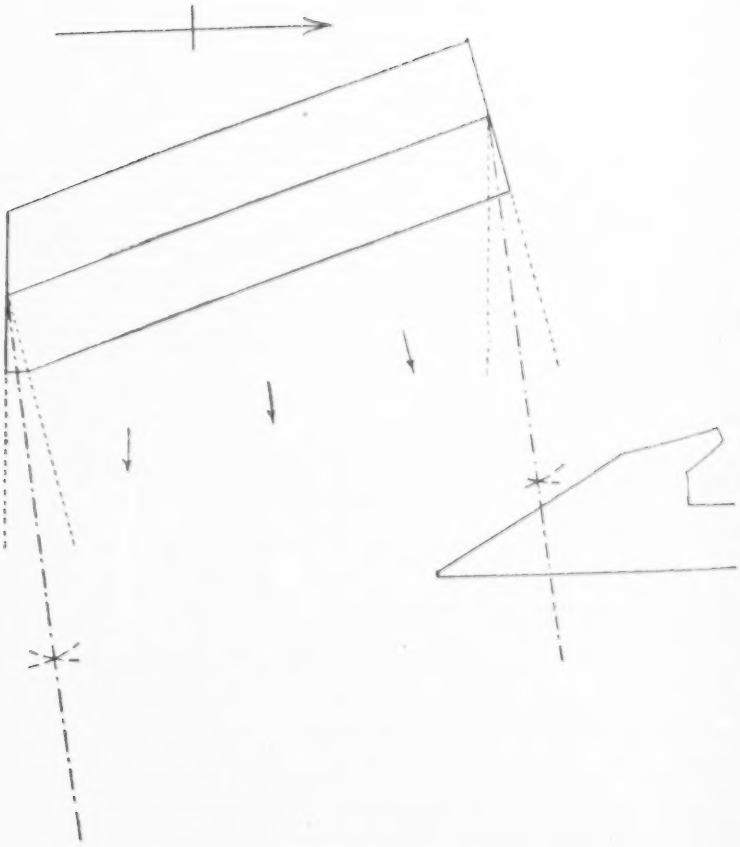
MR. LINDLEY. In other words, that those end lines embrace 1589 $^{34}/_{100}$ feet on the surface.

MR. WRIGHT. I have stated in every way that it is possible to do it that the complaint shows that the end lines are diverging.

MR. LINDLEY. You did not demur to the complaint.

MR. WRIGHT. I did not demur to the complaint for the simple reason I have stated several times in the course of my argument to the Court, that your complaint does state a cause of action, that is, you allege your ownership of that piece of ground.

# Diagram D.



THE COURT. I understand you perfectly; you contend that they allege title to Lot 48.

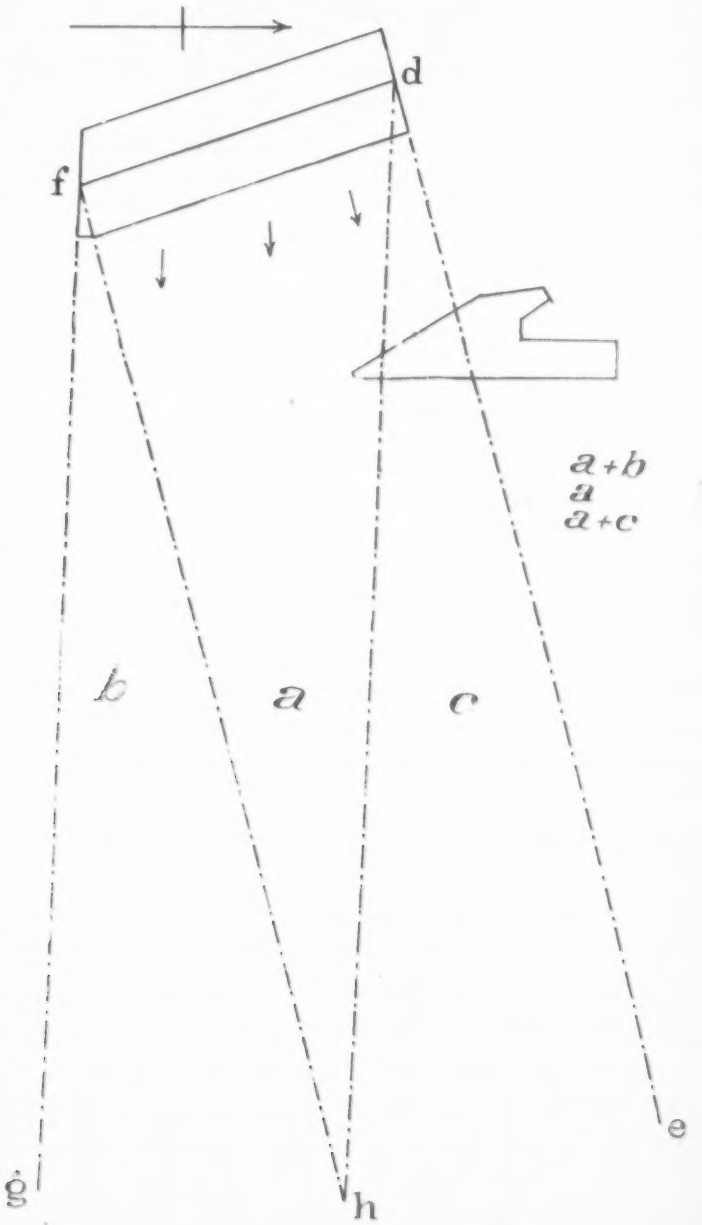
MR. WRIGHT. Yes, and they allege against the defendant a trespass on that segment and therefore they state a cause of action.

(Producing Diagram D) Here is a little plat, if your Honor please, showing a division of this extra angle of 14 degrees and 45 minutes but giving 1589 $^{94}/_{100}$ linear feet between the end lines as marked. This is merely for the purpose of illustration, to show one of the possible methods of solution. But I do not state that this is to be taken in any way as a probable solution nor do I wish to be understood except as denying their extra-lateral right entirely.

(Exhibiting Diagram C[1]) This little map I think is of some significance. Now these green lines d—e and f—g, if your Honor please, represent the end lines of Lot No. 48 extended, and this line d—h is drawn downward parallel to the south end line of Lot No. 48 extended, and the southerly red line f—h is drawn down parallel to the north end line of Lot No. 48 extended. Your Honor can see the extra angle. This is a representation of the angle of 14 degrees and 45 minutes on either side.

Now, if we undertake to define any segment of ground or to show what segment of ground can be defined by reference to these end lines, I submit that, as a geometrical proposition, the triangle "a" is the only constant one. If we parallel the south end line, we have the segments "a" and "b". If we parallel the north end line, we have

## Diagram C¹.



the segments "a" and "c". Then "a" is the only constant quantity.

The objections present these diagrams to the consideration of the Court, and I submit that they show, not *how* the extra-lateral right *can* be defined but that they show it *cannot* be defined by *any language in the complaint*. Here in the triangle "a" is positively the only segment of the lode that can be defined by reference to the end lines of the Pioneer location.

(Exhibiting Diagram M)

This is elementary, if your Honor please, but it will do no harm to call attention just for a moment to an ideal location with end lines crossing the lode at right angles.

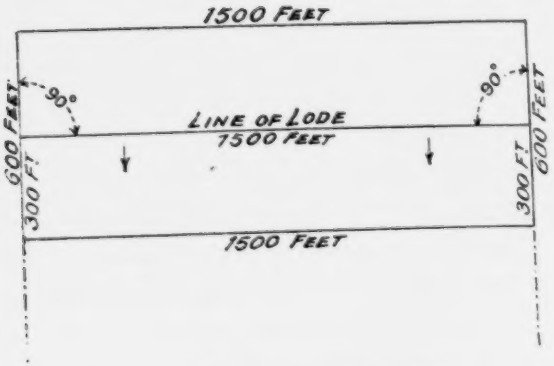
This diagram (exhibiting Diagram N) is also a perfect location, the segment of ground being no more than 600 feet wide and the end lines drawn diagonally across the lode line. This would also be a perfect location and would carry the extra-lateral right.

MR. MCGEE. What would be the extra-lateral right in Diagram N?

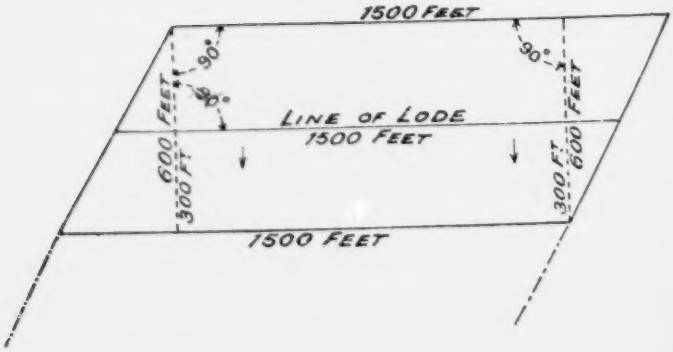
MR. WRIGHT. The extra-lateral right would be between these two planes (showing in direction of dotted lines on Diagram N); that is, the dip being in this direction (showing as in the direction of the arrows on Diagram N).

Some of these maps might have been more properly used in the body of my argument, but I think I may properly use them at present to illustrate the different propositions, without any further comment. I do not desire to comment on them, your Honor.

## Diagram M.




## Diagram N.



Now, of course this illustration varies according to the varying application of the rule drawing the end lines at right angles to the general course of the lode. It depends of course on what the base line is that you take, what the datum line is.

(Presenting Diagram F) The diagram in this instance illustrates the end lines drawn at right angles to the south end of the Kennedy lode, the part south of the bend.

(Presenting Diagram G) In this case, the end lines are drawn at right angles to the north end of the Kennedy lode as described in the patent, the part north of the bend. It is a part of the agreed statement of facts. Your Honor will see that in this case one of the lines is exactly the same as the north end line of the Argonaut extended.

(Presenting Diagram H) In this case the datum line is drawn from the bend in the Kennedy lode to the south center of the Pioneer.

(Exhibits Diagram I) This diagram represents the end lines drawn at right angles to the general course of the lode from the north center of the Kennedy to the south center of the Pioneer.

MR. MCGEE. This is, of course, assuming the general course of the Kennedy lode.

MR. WRIGHT. No, sir, the course of the Kennedy lode as defined in the patent.

MR. LINDLEY. The lode line is defined in the patent, but the lode is not.

MR. WRIGHT. The lode is defined in the patent, begging the gentlemen's pardon.

Diagram F.

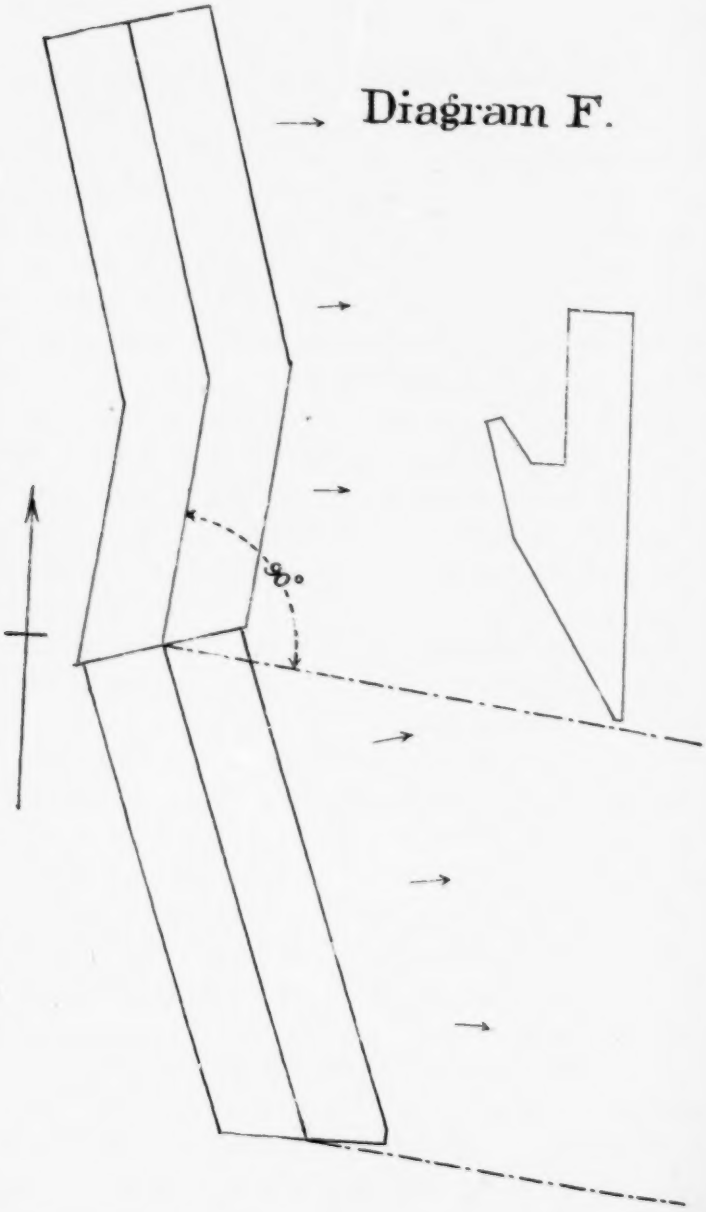


Diagram G.

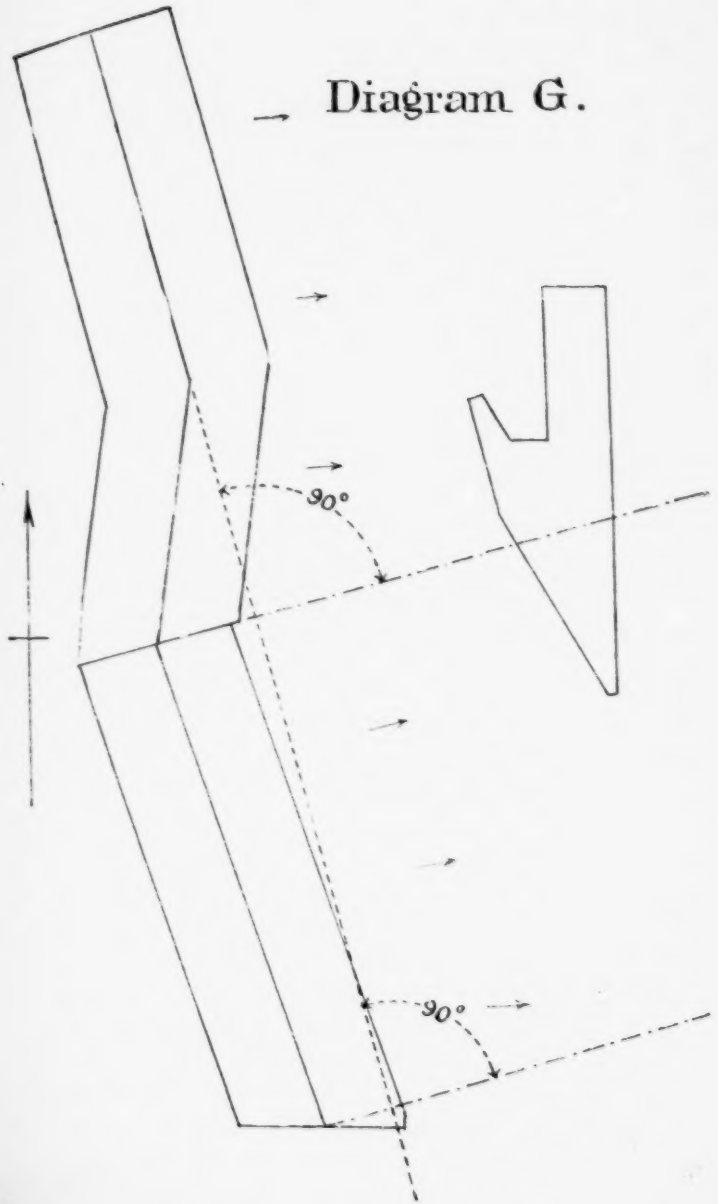


Diagram H.

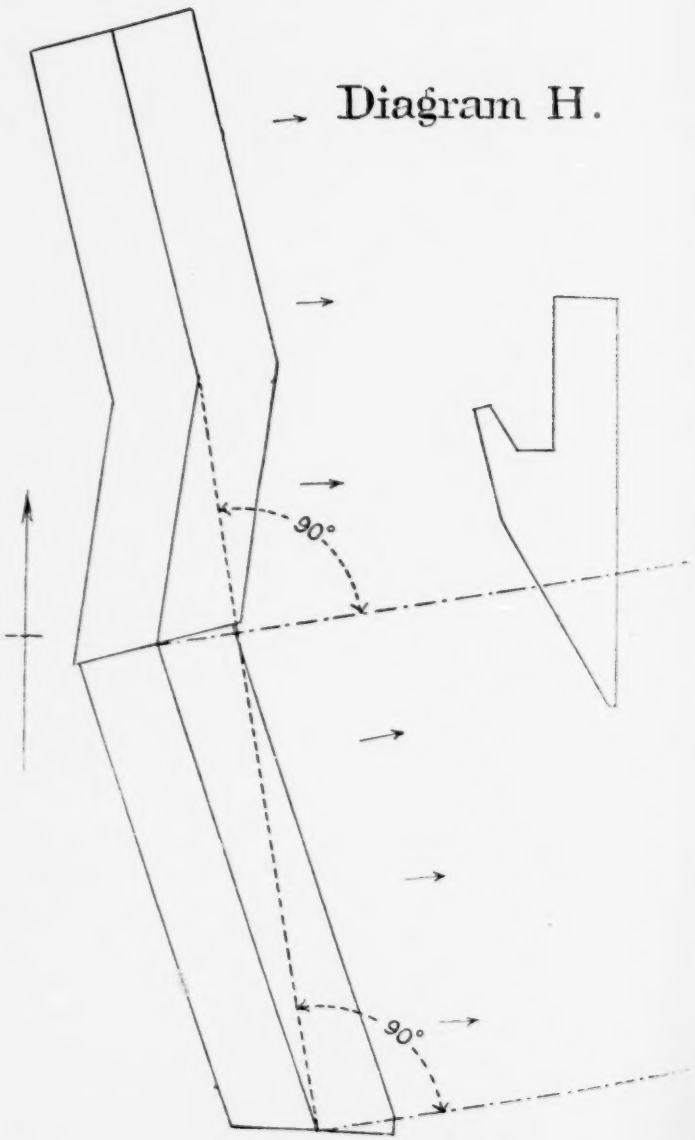
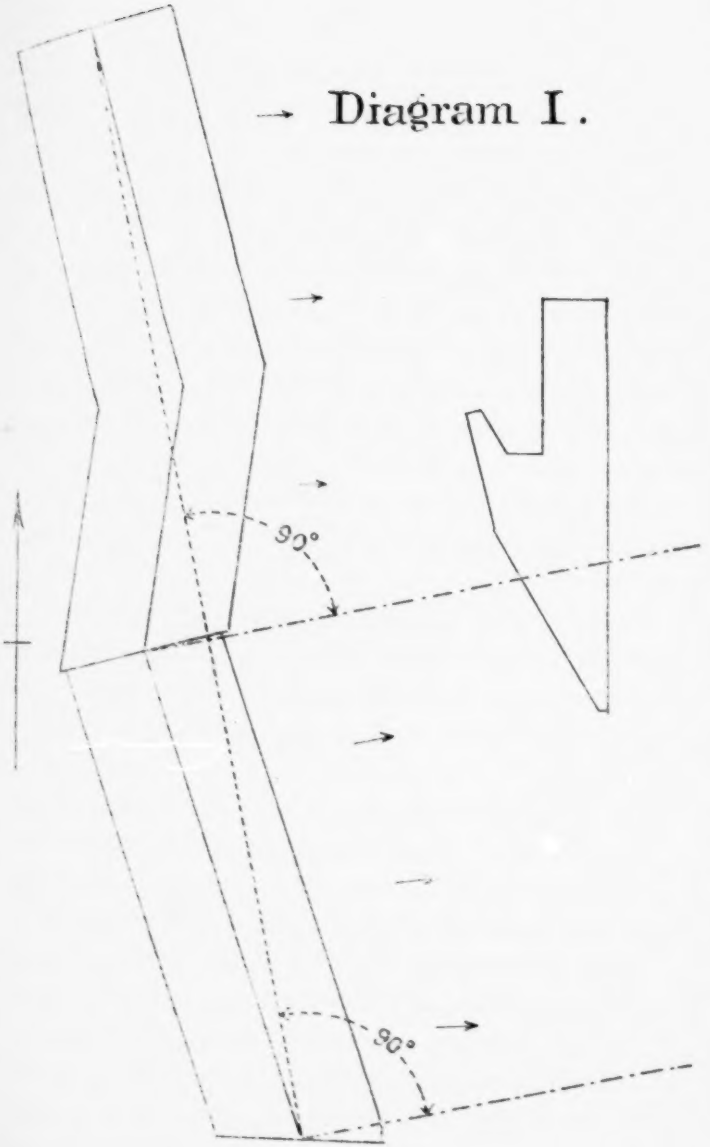


Diagram I.



MR. MCGEE. I suppose the patent will show for itself.

MR. WRIGHT. The lode, as a matter of fact, is defined in the patent.

MR. LINDLEY. Well, we had that same discussion in the Wyoming case.

MR. WRIGHT. I am not talking about the law of the case. I am talking about the facts of the case. You can start from this center (showing the bend in the Kennedy lode) and you can walk on the lode, if you choose, to this point here (showing south center of Kennedy Mine) and you can start from this point (showing the bend in the Kennedy lode) and you can trace the lode up to that end (showing the north end center of Kennedy Mine) without any difficulty.

MR. LINDLEY. But there are local elevations there.

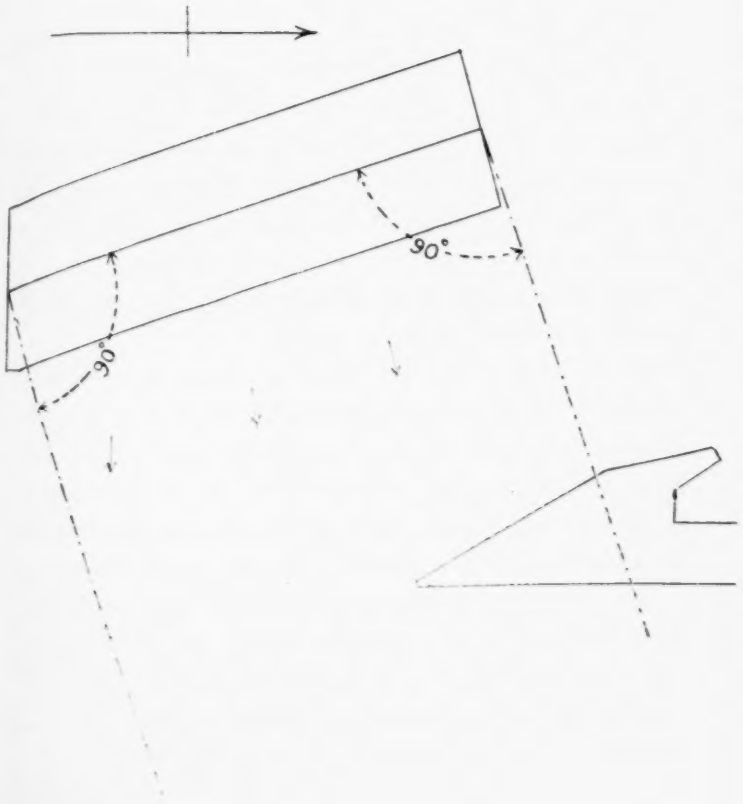
MR. WRIGHT. I know that, sir, but I have traced it. I have traced it from the one point to the other by the assistance of one of the most eminent mining engineers in this state.

MR. LINDLEY. Well, that is not a fact in this case.

MR. WRIGHT. I know, but what I say is that the lode itself is defined in the patent; the Court will examine for itself and understands the purpose of these illustrations.

If your Honor please, these are all the maps that I care to exhibit, and they are exhibited for the purpose of showing not only the difficulty but the absolute impossibility of defining an extra-lateral right by means of this patent, and they are exhibited for the further purpose of showing to a certainty, as I think, that the plaintiff's complaint

# Diagram E.



has not defined any property in anything that can be identified by means of the complaint, excepting a segment of ground. These maps speak for themselves.

MR. MCGEE. What does the map "E" show, Mr. Wright; have you explained that?

MR. WRIGHT. Map "E" shows the same as the blue lines that you have on your big map. (See Diagram E.)

MR. MCGEE. The Pioneer claim with the end lines drawn at right angles to the lode?

MR. WRIGHT. Drawn at right angles to the Pioneer lode. These are a little to the north (showing on Diagram E) but if you would draw the lines at right angles to the course of the Kennedy lode and apply your rule, I think we could shake hands with you very soon.

MR. MCGEE. The compromise says that the lines should be drawn at right angles.

MR. WRIGHT. We care nothing about any compromise, and we have already shown our reasons why. The Kennedy Company does not claim the right to all that triangle (See Diagram E') though it would be awarded to us under the Eureka case—under the end line portion of the decision in the Eureka case—but we do not ask it.

Now, if your Honor please, I have talked a long time, but even if I have wearied you, I shall not apologize, for I have only acted in the line of my duty, and I hope that your Honor has listened with patience, at least.

I will now give way to my associate, Mr. Waters.

# APPENDIX.

TRANSCRIPT OF RECORD IN NO. 1408.

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IN THE

## SUPERIOR COURT OF THE COUNTY OF CALAVERAS

AND

STATE OF CALIFORNIA.

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## ARGONAUT MINING COMPANY

VS.

## KENNEDY MINING AND MILLING COMPANY.

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## No. 1408.

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# 1. COMPLAINT.

IN THE

## Superior Court of Amador County,

STATE OF CALIFORNIA.

ARGONAUT MINING COMPANY (A CORPORATION), *Plaintiff*,

VS.

KENNEDY MINING AND MILLING COMPANY (A CORPORATION), *Defendant*.

**Complaint.**

Plaintiff complains of defendant and alleges:

I.

That at all times mentioned in this complaint the plaintiff Argonaut Mining Company was and now is a corporation organized, existing and doing business under and by virtue of the laws of the State of California.

II.

That at all times mentioned in this complaint the defendant Kennedy Mining and Milling Company was and now is a corporation organized, existing and doing business under and by virtue of the laws of the State of California.

III.

That at all times mentioned in this complaint the plaintiff has been and now is the owner and in the possession and entitled to the sole and exclusive possession of all that certain mine and mining claim situate, lying and being in Jackson Mining District, Amador County, State of California, designated by the Surveyor-General of the State of California as Lot No. Forty Eight (48), embracing a portion of the North East Quarter of Section Twenty (20) in Township Six (6) North of Range Eleven (11) East Mt. Diablo Meridian, which said mine and mining claim was and is commonly known as and called the Pioneer Quartz Mine, and is more particularly described as follows, to wit:

Beginning at a post marked 46 from which the quarter section corner between sections twenty (20) and twenty one (21) in Township Six (6) North of Range Eleven (11) East Mount Diablo Meridian bears North Eighty nine (89) degrees thirty six (36) minutes east at the distance of Twenty (20) chains and eleven (11) links; thence from said post marked 46 South eighty nine (89) degrees thirty six (36) minutes west, three (3) chains and eighty (80) links to post marked 46, at southern end of the lode, seven (7) chains and eighty (80) links to post marked 46; thence North nineteen (19) degrees fourteen (14) minutes west, twenty three (23) chains and seven (7) links to post marked 46, at the north west corner of the claim from which post marked 37 situate at the south west corner of the Kennedy Company's claim upon the Kennedy Mine

bears South seventy four (74) degrees fifty one (51) minutes west at the distance of thirty two (32) links; thence from said post marked 46 North seventy four (74) degrees fifty one (51) minutes East along the Southern boundary of the Kennedy Company's claim three (3) chains and eighty (80) links to post marked 37 and 46 the same being situate at the northern end of the said Pioneer Gold and Silver Mining Company's claim and at the Southern end of the said Kennedy Company's claim seven (7) chains and sixty (60) links to post marked 46 from which a post marked 37 situate at the South East corner of the said Kennedy Company's claim bears North seventy four (74) degrees fifty one (51) minutes East at the distance of thirty two links. Thence from said post marked 46 South nineteen (19) degrees fourteen (14) minutes East four (4) chains and three (3) links to post marked 46 situate at the Southwest corner of the Mill Site belonging to said Pioneer Quartz Mine and adjoining the same on the East, twenty four (24) chains and fifty (50) links to post marked 46. Thence South fifty-seven (57) links to place of beginning.

And plaintiff avers that at all of said times it was and now is the owner, in the possession of and entitled to the exclusive possession of 1,589 94-100 linear feet of that certain quartz vein or lode known as the Pioneer Quartz vein or lode, which has its apex within the premises hereinbefore described, with the exclusive right to said 1,589 94-100 feet of said lode throughout its entire depth, although it may enter the land adjoining. And said

plaintiff at all of said times was and now is the owner of all other veins, lodes and ledges throughout their entire length and depth, the top or apices of which lie within or inside of the exterior lines of the Pioneer Quartz Mine described as aforesaid, extended downward vertically, although such veins, lodes or ledges in their downward course may so far depart from a perpendicular as to extend outside of the vertical side lines of said described Pioneer Quartz Mine.

IV.

That defendant has sunk an incline shaft upon land adjacent to plaintiff's mining claim and since August 11th, 1894, and prior to the commencement of this action said defendant by means of said shaft and of levels, drifts, crosscuts and stopes, has penetrated into and upon the said lands and premises belonging to this plaintiff as hereinbefore alleged and into and upon the lodes, ledges and veins having their apices within the surface lines of said Pioneer Quartz Mine, and by means of said underground works has wilfully, wrongfully and unlawfully and without the license or consent of said plaintiff worked and mined said lodes, ledges and mining ground and has taken out and extracted therefrom and converted to its own use large quantities of gold bearing quartz of great value.

And plaintiff alleges upon its information and belief that said defendant since Aug. 11, 1894, and prior to the commencement of this action has extracted over three

thousand tons of ore and gold bearing quartz from the veins, lodes and ledges aforesaid, and has taken out, carried away and converted the same to its own use. That said ore was of great value, to-wit: Of the value of 135 Thousand Dollars. That by reason of the aforesaid acts of defendant plaintiff has been damaged in the sum of One Hundred and Thirty-Five Thousand Dollars.

V.

Plaintiff further alleges that defendant threatens to continue said wrongful acts and threatens to continue to so mine and work the veins, ledges and lodes so belonging to this plaintiff as hereinbefore set forth and to extract, remove and convert to its own use the gold bearing ore and quartz therein and will do so unless restrained by the order of this court.

WHEREFORE plaintiff prays judgment against defendant.

FIRST—For the sum of One Hundred Thirty-Five Thousand Dollars damages and for its cost of suit herein.

SECOND—That the defendant and its agents, servants and employees be enjoined from trespassing upon said plaintiff's said property or upon any portion thereof pending this action and from in any manner extracting ore or gold bearing quartz therefrom or entering in or upon the lodes or ledges of plaintiff.

THIRD—That by the final judgment of this court defendant be perpetually restrained and enjoined from trespassing upon the lands, lodes and ledges of plaintiff.

FOURTH—That plaintiff have such other, further and general relief as may be just.

LINDLEY & EICKHOFF, and
W. J. McGEE,
Attorneys for Plaintiff.

STATE OF CALIFORNIA, }
County of Amador. } ss.

W. F. Detert, being first duly sworn, deposes and says: I am the President of the Argonaut Mining Company, the plaintiff named in the foregoing complaint. I have read said complaint and know the contents thereof. The same is true of my own knowledge except as to the matters therein stated upon information or belief and as to such matters I believe it to be true.

W. F. DETERT.

Subscribed and sworn to before me this 5th day of August, 1897.

(Notarial Seal)

THOMAS CANLON,
Notary Public,
Amador County, Cala.

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[Endorsement]: No. 1408. In Superior Court, County of Amador. Argonaut Mining Company (a corporation), Plaintiff, vs. Kennedy Mining and Milling Company, Defendant. Complaint. Filed August 5, 1897. C.

L. Culbert, Clerk. Lindley & Eickhoff, Attorneys for Plaintiff, 530 California Street, San Francisco, Cal, Rooms 39, 40, 41 and 42. Filed May 6, 1898, A. L. Wyllie, Clerk.

## 2. ANSWER.

IN THE

## Superior Court of the County of Amador,

STATE OF CALIFORNIA.

ARGONAUT MINING COMPANY (A CORPORATION), *Plaintiff*,

vs.

KENNEDY MINING AND MILLING COMPANY (A CORPORATION), *Defendant*.

No. 1408.

**Answer.**

Now comes the above named defendant and answers the complaint filed by the above named plaintiff in the above entitled action.

Defendant admits that at all the times mentioned in the said complaint the plaintiff Argonaut Mining Company has been and that it now is the owner, and in possession and entitled to the sole and exclusive possession of all that certain mine and mining claim situate, lying and being in Jackson Mining District, Amador County, State of California, designated by the United States Surveyor General for the State of California as Lot No. Forty-eight (48) embracing a portion of the North East quarter of Section twenty (20) in Township Six (6) North of Range Eleven (11) East Mt. Diablo Meridian, which said mine and mining claim was and is called the Pioneer Quartz Mine.

And defendant admits and alleges that the particular description of said Pioneer Quartz Mine, to-wit, said Lot No. Forty-eight, and of the exterior boundaries thereof

and of the place of beginning thereof, set forth in said complaint, is true and correct, that is to say, that said Pioneer Quartz Mine, to-wit, said Lot Number 48, is particularly and correctly described as follows, to-wit, Beginning at a post marked 46 from which the quarter section corner between sections twenty (20) and twenty-one (21) in Township Six (6) North of Range Eleven (11) East Mount Diablo Meridian bears North Eighty-nine (89) degrees thirty-six (36) minutes East at the distance of twenty (20) chains and eleven (11) links; Thence from said post marked 46 South eighty-nine (89) degrees thirty-six (36) minutes West, three (3) chains and eighty (80) links to post marked 46, at southern end of the lode seven (7) chains and eighty (80) links to post marked 46; Thence North Nineteen (19) degrees fourteen (14) minutes west, twenty-three (23) chains and seven (7) links to post marked 46, at the North west corner of the claim from which post marked 37 situate at the South West corner of the Kennedy Company's claim upon the Kennedy Mine bears South seventy-four (74) degrees fifty-one (51) minutes West at the distance of thirty-two (32) links; Thence from said post marked 46 North seventy-four (74) degrees fifty-one (51) minutes East, along the southern boundary of the Kennedy Company's claim three (3) chains and eighty (80) links to post marked 37 and 46, the same being situate at the northern end of the said Pioneer Gold and Silver Mining Company's claim and at the southern end of the said Kennedy Company's claim seven (7) chains and sixty (60) links to post marked 46 from

which a post marked 37 situate at the South East corner of the said Kennedy Company's claim bears North seventy-four (74) degrees fifty-one (51) minutes east at the distance of thirty two (32) links; Thence from said post marked 46 South nineteen (19) degrees fourteen (14) minutes East four (4) chains and three (3) links to post marked 46, situate at the southwest corner of the Mill Site belonging to said Pioneer Quartz Mine and adjoining the same on the east, twenty-four (24) chains and fifty (50) links to post marked 46, thence South fifty-seven (57) links to place of beginning.

And defendant admits and alleges that the southern end of the lode, to-wit, the Pioneer Lode, named and described in said complaint, is truly and correctly described in said complaint as being situate South Eighty-nine (89) degrees thirty-six (36) minutes west three (3) chains and eighty (80) links from the aforesaid place of beginning of said Pioneer Quartz Mine, to-wit, said Lot Number 48, and defendant alleges that the aforesaid Southern end of said lode is and at all times named in said complaint was the place of beginning of all and singular the aforesaid ownership, claim, possession and right of possession of said Argonaut Mining Company of, in and to the said lode.

And defendant alleges that the Pioneer Quartz vein or lode which is alleged in said complaint to have its apex within said Pioneer Quartz Mine, to wit, said Lot No. 48, dips easterly and extends downward to an unknown depth into the earth at an average angle of about forty-

five (45) degrees easterly from the vertical, and in its said course downward passes from and extends out of said Lot Number 48 easterly through and beyond the vertical East side-line thereof, into ground lying easterly from said Lot Number 48 and from said east side line thereof.

And defendant admits and alleges that, as set forth in said complaint, the southern end line of said Pioneer Quartz Mine, to wit, said Lot Number 48, is the beginning and initial boundary thereof, and that the end lines of said Pioneer Quartz Mine, to wit, said Lot Number 48, are not parallel, but, on the contrary, that the northern end line thereof in its course from its west end easterly diverges substantially and at a very large angle toward the north from a direction parallel to said southern end line and initial boundary thereof, such divergence being to the extent of fourteen (14) degrees and forty-five (45) minutes northerly from a direction parallel to said southern end line and initial boundary, the course of said southern end line and initial boundary from its west end easterly being north eighty-nine (89) degrees thirty-six (36) minutes east, and the course of said northern end line from its west end easterly being north seventy-four (74) degrees fifty-one (51) minutes east, and defendant alleges that such divergence between said end lines is easterly and toward and in the direction of the aforesaid dip and downward extension of said Pioneer Quartz vein or lode.

And defendant denies that said plaintiff at all the times named in said complaint or at any time or times what-

ever was or now is the owner, in the possession of and entitled to the exclusive possession of, or was or now is the owner of, or was or now is in the possession of, or was or now is entitled to the exclusive or any possession of, 1,589 94-100 linear feet or any other number of linear or other feet or any portion of said Pioneer Quartz Vein or lode throughout its entire depth or to or at any depth or place outside of the surface lines of Pioneer Quartz Mine, to wit, said Lot Number 48, extended downward vertically, and defendant denies that said plaintiff ever owned or now owns or was ever or is now in the possession of or was ever or is now entitled to the exclusive or any possession of 1,589 94-100 linear feet or any other number of linear or other feet or any part of said Pioneer Quartz Vein or lode, which extends or lies outside the vertical side lines of the surface location of said Pioneer Mine, to wit, said Lot Number 48, and defendant denies that said plaintiff ever owned or now owns or was ever or is now in the possession of or was ever or is now entitled to the exclusive or any possession of 1,589 94-100 linear feet or any other number of linear or other feet or any part of said Pioneer vein or lode, which enters or lies within the land or any land adjoining the Pioneer Mine, to wit, said Lot Number 48.

And defendant denies that said plaintiff at all the times named in said complaint or at any time or times whatever, was or now is the owner of all other veins, lodes and ledges or of any other vein or veins, lode or lodes, ledge or ledges, the tops or apices of which lie within or inside

of the exterior lines of said Pioneer Quartz Mine extended downward vertically, throughout their entire length and depth or throughout or to or at any length or depth or place whatever outside of the vertical side lines of said Pioneer Quartz Mine, and defendant denies that said plaintiff at any time or times whatever was or now is the owner or in any manner entitled to said or any vein or veins, or lode or lodes, or ledge or ledges, or any part of them, or any of them, which in their downward course so far depart from a perpendicular as to extend outside of the vertical side lines of said Pioneer Quartz Mine, and defendant denies that said plaintiff ever was or now is the owner of any part, parcel or portion of any lode, vein or ledge named in said complaint, extending or lying outside the vertical boundaries of said Pioneer Quartz Mine, to wit, said Lot Number 48, whether the top or apex of any such lode or vein or ledge lies within or without the vertical boundaries of said Lot Number 48.

And defendant denies that since August 11th, 1894, and prior to the commencement of this action or at any time or times whatever, said defendant by means of the shaft named in said complaint and of levels, drifts, crosscuts and stopes, or by means of any of them, or by means of any shafts or shaft or levels or level or drifts or drift or crosscuts or cross-cut or stopes or stope or by any other means or at all, has penetrated into or upon said or any lands or premises then or ever belonging to said plaintiff or upon the or any ledge or ledges, or lode or lodes or vein or veins having their apices within said Pioneer Quartz Mine, and

defendant denies that at all or any of the times aforesaid or at any time or times whatever, defendant by means of said underground works or by means of any underground works or by any other means or at all, wilfully, wrongfully and unlawfully and without the license or consent of said plaintiff or wilfully or wrongfully or unlawfully or with or without the license or consent of said plaintiff, worked and mined or worked or mined said lodes, ledges, and mining ground or any of them or any lodes or lode or ledges or ledge or mining ground then or ever belonging to said plaintiff, and took out and extracted and converted to its own use or took out or extracted or converted to its own or any use, therefrom or from any ground or premises then or ever belonging to said plaintiff, large or any quantities or quantity of gold bearing quartz of great or any value.

And defendent denies that since August 11th, 1894, and prior to the commencement of this action or at any time or times whatever, defendant extracted three thousand tons or any other number of tons or any quantity of ore and gold bearing quartz or three thousand or any other number of tons or any quantity of ore or gold bearing quartz from the veins, lodes and ledges aforesaid or any of them or from any veins or vein, lodes or lode, ledges or ledge then or ever belonging to said plaintiff, and took out, carried away and converted the same or any thereof to its own use or took out or carried away or converted the same or any thereof to its own or any use, and defendant denies that said ore was of the value of One Hundred

and thirty five Thousand Dollars or of the value of any other sum or of any value at all and defendant denies that said plaintiff was damaged by the acts of said defendant set forth in said complaint or by any acts or act of said defendant in the sum of One Hundred and Thirty-Five Thousand Dollars or in any other sum or in any manner or at all.

And defendant denies that it did ever at any time by means of any shafts or shaft or of any levels or level, drifts or drift, crosscuts or crosscut, stopes or stope or by any means whatever or at all, penetrate into or upon any lands or land or premises or lodes or lode or ledges or ledge or veins or vein belonging in any manner to said plaintiff, and denies that by means of underground works or by any means or at all, said defendant wilfully or wrongfully or unlawfully or without the license and consent of said plaintiff or at all, worked or mined any lodes or lode or ledges or ledge or mining ground belonging in any manner to said plaintiff, and denies that said defendant ever at any time took out or extracted therefrom or converted to its own or any use large or any quantities or quantity of ore, gold bearing rock or quartz of great or any value, and denies that said defendant extracted therefrom three thousand tons or any quantity of ore or gold bearing quartz or any ore or gold bearing quartz whatever, and denies that said defendant ever took away or converted the same or any thereof to its own or any use or at all, and denies that said ore was of the value of One Hundred and Thirty-Five Thousand Dollars or of

any other sum or of any value and denies that said plaintiff was ever damaged by any acts or act of this defendant in the sum of One Hundred and Thirty-five Thousand Dollars or in any other sum or at all.

And defendant denies that it ever entered upon any premises of said plaintiff without its knowledge, license and consent first had and obtained.

And defendant denies that it ever entered upon or penetrated underground any lode or premises belonging to said plaintiff either with or without its consent.

And defendant denies that it ever worked or mined any lode or premises belonging to said plaintiff.

And defendant denies that it ever extracted or took out from any lode or premises belonging to said plaintiff, any ore or any thing whatever.

And defendant denies that it ever took away or converted to its own or any use any gold bearing quartz or any other thing belonging to said plaintiff.

And defendant denies that said plaintiff was ever damaged by any act or acts of defendant in any sum or value whatever.

And defendant denies that defendant threatens to continue the wrongful acts alleged in plaintiff's said complaint, and denies that defendant threatens to continue or to do or perform any wrongful acts whatever, and denies that defendant threatens to mine and work the veins, ledges and lodes belonging to plaintiff as alleged in said complaint, and denies that defendant threatens to mine and work or to mine or work any veins or vein or

ledges or ledge or lodes or lode belonging to plaintiff, and denies that defendant threatens to extract, remove and convert to its own use the gold bearing ore and quartz in said veins, ledges and lodes belonging to plaintiff as alleged in said complaint, and denies that defendant threatens to extract or remove or convert to its own or any use the gold bearing ore or quartz in said or any veins or vein or ledges or ledge or lodes or lode belonging to plaintiff.

WHEREFORE, defendant prays that plaintiff take nothing by this action and that defendant be hence dismissed, with judgment for its reasonable costs and charges in this behalf sustained.

JOHN M. WRIGHT,
Attorney for Defendant.

STATE OF CALIFORNIA, }
City and County of San Francisco. } ss.

JOHN BARTON, being first duly sworn, deposes and says: That he is an officer, to wit, the President of Kennedy Mining and Milling Company, the defendant named in the foregoing answer; That he has read said answer and knows the contents thereof; That the same is true of his own knowledge except as to the matters therein stated upon information or belief and as to such matters that he believes it to be true.

JOHN BARTON.

Subscribed and sworn to before me this the 12th day of Feby., 1898.

(Notarial Seal.) JAMES L. KING,
Notary Public in and for the City and County of San Francisco, State of California.

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[Endorsement]: No. 1408. Original. State of California, County of Amador, In the Superior Court. Argonaut Mining Company (a Corporation) Plaintiff, vs. Kennedy Mining and Milling Company (a Corporation) Defendant.

Answer. Service of the within by delivery of a copy thereof admitted this the 12th day of February, 1898. Lindley & Eickhoff, W. J. McGee, Attorneys for Plaintiff. John M. Wright, Rooms 47 and 10, eighth floor, Mills Building, San Francisco, Attorney for Defendant. Filed Feb. 14, 1898. C. L. Culbert, Clerk. By B. R. Breese, Deputy Clerk. Filed May 6, 1898. A. L. Wyllie, Clerk.

## 3. AGREED STATEMENT OF FACTS AND STIPULATION SUBMITTING CAUSE.

IN THE

**Superior Court of the County of Calaveras,**

STATE OF CALIFORNIA.

ARGONAUT MINING COMPANY,
*Plaintiff,*

vs.

KENNEDY MINING AND MILLING COMPANY,
*Defendant.*

No. ——,
Formerly No. 1408 in the Superior Court of Amador County.

**Agreed Statement of Facts and Stipulation Submitting Cause.**

IT IS STIPULATED AND AGREED that for all the purposes of this action the following facts are true and for the purposes of the trial hereof they shall be deemed and taken as if proved by sufficient evidence, but the admission of such facts respectively as evidence in this cause shall be deemed and taken as duly objected to by the respective parties for want of relevancy and materiality to and competency to prove the issues presented by the pleadings, as fully for all purposes as though such objections were separately made and noted on the record in the customary legal manner.

AND IT IS FURTHER STIPULATED AND AGREED that the admission of each of such facts as evidence and such objections thereto shall be ruled upon by the Court at the time of the Court's decision of the cause after final argument and submission.

Each or either party may serve on the opposite party and file in this cause within twenty days from this date, a statement in writing setting forth specifically its objections to each fact the admission of which is objected to by it for want of relevancy and materiality to and competency to prove the issues presented by the pleadings or for want of relevancy or materiality to or competency to prove such issues, and such written statement of objections shall be deemed and taken as part of the record of the cause and the objections therein stated shall be ruled on by the Court the same as though made in open Court or as though specifically set forth in this stipulation.

AND IT IS FURTHER STIPULATED AND AGREED that each of such rulings by the Court upon the admission of such facts as evidence and upon such objections thereto, shall be deemed and taken as duly excepted to by the party against which such ruling shall be made, as fully for all purposes as though such exceptions were separately taken and noted on the record in the customary legal manner.

I.

That the plaintiff in this action is and ever since June 14th, 1893, has been a Corporation duly organized and

existing under and by virtue of the laws of the State of California.

II.

That the Defendant Kennedy Mining and Milling Company is and ever since December 22, 1886, has been a corporation duly organized and existing under and by virtue of the laws of the State of California.

III.

That on and for more than twenty-five years prior to July 3rd, 1893, the Pioneer Gold and Silver Mining Company was a corporation duly organized and existing under and by virtue of the laws of the State of California.

IV.

That at the time of its application for patent for the premises known as "Kennedy Mine" hereinafter described, the Kennedy Mining Company was and for many years thenceforward continued to be a corporation organized and existing under the laws of the State of California.

V.

On October 13, 1870, said Kennedy Mining Company filed its application for patent in the United States Land Office at Sacramento, California, wherein it applied for a patent to the property generally known as the "Kennedy Mine" now designated as Lot Number 44, forming a por-

tion of Sections 17 and 20 in Township 6 North, of Range Eleven East, Mt. Diablo Meridian.

A diagram of the premises for which patent was so applied for was posted in the U. S. Land Office at Sacramento on October 15, 1870.

VI.

On January 13th, 1871, the Pioneer Gold and Silver Mining Company, the immediate predecessor in title of this plaintiff, filed its application for patent in the United States Land Office, at Sacramento, California, wherein and whereby it applied for the issuance to it of a patent for the premises commonly known as and called the Pioneer Quartz Mine now known as Lot No. 48 embracing a portion of N.E. quarter of Section 20, T. 6 N., R. 11 E., Mt. Diablo Meridian, and a diagram of the ground so claimed and for which patent was sought was posted in the office of the Register of said Land Office and upon said claim.

VII.

That there was a surface conflict as to area claimed by said respective applicants for patent, as shown by the proceedings in said Land Office, said conflict occurring on the Northern end of said Pioneer Quartz Mine as applied for, and the southern end of said Kennedy Mine, as applied for.

That thereupon, and on January 13th, 1871, the Register and Receiver of said Land Office made and entered the following order:

"U. S. Land Office,

"Sacramento, Cal., Jan. 13th, 1871.

"In the Matter of the Application
"for Patent and adverse claim of
"The Pioneer Gold and Silver
"Mining Company, a Corporation.

vs.

"The Kennedy Mining Company
"a Corporation, applicant under
"Acts of Congress of July 26th,
"1866, and July 9th, 1870.

"Now on this day upon a careful examination of the "foregoing testimony and the application and records of "said application and adverse claim herein filed, we find "that said adverse claim is such a one as is contemplated "by the 6th section of the Act herein provided and the "regulations of the General Land Office; and that said "adverse claimant is entitled to a search and be heard "relative thereto in the local courts.

"It is therefore hereby ordered that the proceedings in "the case of Kennedy Mining Company, applicant for a "patent be and the same are hereby suspended so far as "the same affects the following described piece or parcel "of land, Commencing at the Northern boundary of said "Pioneer Gold and Silver Mining Company's claim and "running thence southerly on said vein or lode, and sur-"face ground of said Pioneer Company $153^{78}/_{100}$ feet "which portion thereof is claimed by the Kennedy Min-"ing Company, a corporation; said land being in the

"N.E. ¼ of Section 20, Township 6 North, Range 11 "East, Mount Diablo Base and Meridian, until an adjust- "ment can be had of said adverse claim in the local "courts having jurisdiction thereof as required by said "Acts and Regulations herein provided.

"JOHN G. McCALLUM, Register,
"HART FELLOWS, Receiver."

VIII.

That thereafter, and on February 20th, 1871, the said respective applicants for patent, to wit, the Pioneer Gold and Silver Mining Company, and the Kennedy Mining Company, made and entered into an agreement in writing which was filed in the office of said Register and Receiver at Sacramento, and forms a part of the record of each of said applications for patent.

Said agreement is in words and figures following, to wit:

"In the matter of the Applications respectively of the Pioneer Gold and Silver Mining Company, and the Kennedy Mining Company for Patents to Quartz Mining Claims.

WHEREAS, the above named corporations have respectively filed applications in the United States Land office at Sacramento, for Patents, to Quartz Mining Claims in Amador County, California, from which it appears that there is a conflict of claim to a portion thereof.

AND, WHEREAS, the said corporations have mutu-

ally adjusted, settled and compromised such conflict of claims.

NOW, THEREFORE, in consideration thereof these presents WITNESSETH: That the Pioneer Gold and Silver Mining Company withdraws from its application as aforesaid any claim to the northern portion of the quartz lode or lead and surface ground therein described and embracing forty feet and six inches, to wit: Beginning at the Live Oak Tree, the point of commencement mentioned in said application, and extending thence south, the aforesaid forty feet and six inches. And the Kennedy Company abandons all claim to any portion of the said quartz lode or lead and surface ground, south of the point where such extent of forty feet and six inches shall terminate.

And the dividing line between the claims of the respective companies shall be one drawn at right angles with the general course of the lode or lead, and surface ground thereto appurtenant, and at the point hereinbefore designated, to wit: where such extent of forty feet and six inches shall terminate.

WITNESS the private seal of the Pioneer Gold and Silver Mining Company (no corporate seal having yet been provided for that company) and the corporate seal of the Kennedy Mining Company with the signatures of the officers of each company respectively hereunto set this 20th day of February, A. D. 1871.

THE PIONEER GOLD AND SILVER MINING CO.

(Seal)

Louis Mentzel, President
G. Weller, Secretary
F. Hoffman ) Trustees Pioneer
George Stoessel ) Gold and Silver
Mining Co.

By LOUIS MENTZEL.

SAMUEL W. BRIGHT,
President Kennedy Mining Company.
P. REICHLING,
J. MEEHAN,
Trustees.
[L. S.] C. H. TURNER,
Secretary Kennedy Mining Company."

IX.

That on the 15th day of March, 1871, the Surveyor General of the United States for the State of California issued his instructions to William L. McKim, United States Deputy Mineral Surveyor, to make survey for patent of said Kennedy Quartz Mine.

X.

That in pursuance of said instructions said William McKim during the months of April and May, 1871, made and completed such survey and thereupon made a return of such survey to the United States Surveyor General's office, and on the 19th day of October, 1871, said Surveyor

General approved said survey as so returned and thereafter and on the 11th day of November, 1871, said Kennedy Mining Company entered and paid for said mining claim so surveyed by said McKim and the Receiver of the said United States Land Office thereupon issued his duplicate receipt evidencing such entry and payment.

XI.

That thereafter, to-wit, on the 29th day of July, 1872, the Government of the United States issued to said Kennedy Mining Company its certain letters patent of which the following is a copy:

"GENERAL LAND OFFICE

No. 393.

MINERAL CERTIFICATE

No. 38.

THE UNITED STATES OF AMERICA,

To all to whom these Presents shall come, GREETING:

WHEREAS, in pursuance of the Act of Congress approved July twenty sixth, eighteen hundred and sixty six, entitled "An Act granting the right of way to ditch and canal owners over the public lands, and for other purposes," the act amendatory thereof approved July 9th, 1870; and the Act approved May tenth, eighteen hundred and seventy-two, entitled "An Act to promote the development of the mining resources of the United States," there have been deposited in the General Land Office of the United States, the plat and field notes of survey of

the claim of the Kennedy Mining Company, upon the Kennedy Quartz Mine, bearing gold, accompanied by the certificate of the Register of the Land Office at Sacramento, in the State of California, whereby it appears that in pursuance of said acts of Congress the Kennedy Mining Company did, on the eleventh day of November, A. D. 1871, enter and pay for said mining claim or premises, being mineral entry No. 38, in the series of said office, designated by the Surveyor General as Lot number forty-four (44) forming a portion of Sections seventeen (17) twenty (20) in Township Six (6) North of Range eleven (11) East, Mount Diablo Meridian in the Jackson Mining District in the County of Amador, and State of California, in the District of Lands subject to sale at Sacramento embracing twenty-seven and eighty-five hundredths (27.85) acres of land, more or less, and according to the returns on file in the General Land Office, bounded, described and platted as follows, with magnetic variation as hereinafter stated, East, to-wit:

Beginning for the description of that portion of the lode hereby conveyed at a post marked 37, from which the North east corner of section twenty (20) in Township Six (6) North of Range Eleven (11) East, Mount Diablo Meridian, bears North seventy-four (74) degrees twenty-six (26) minutes east, with magnetic variation at seventeen (17) degrees east at the distance of thirty-one (31) chains and seventy-three (73) links; thence from said post south eight (8) degrees eight (8) minutes west with magnetic variation at seventeen (17) degrees east eight (8)

chains and sixty-two (62) links to post marked 37 situate at southern boundary of the Kennedy Quartz Mine and from said post first hereinbefore described north eight (8) degrees eight (8) minutes east with magnetic variation at seventeen (17) degrees east four (4) chains and thirteen (13) links to oak post marked 37, from which the North east corner of said section twenty (20) bears north eighty-one (81) degrees thirty-six (36) minutes east at the distance of thirty (30) chains thirty-one (31) links; Thence from said oak post north fifteen (15) degrees eighteen (18) minutes west with magnetic variation at seventeen (17) degrees east, two (2) chains to Ione and Jackson Road three (3) chains and fifty-five (55) links to ravine, seventeen (17) chains and seventy-seven (77) links to post marked 37 situate on north boundary of claim.

Beginning for the description of the surface ground hereby conveyed at post marked 37 situate at the north west corner of the claim. Thence north seventy three (73) degrees thirty-nine (39) minutes east with magnetic variation at sixteen (16) degrees thirty-seven (37) minutes east seven (7) chains and fifty eight (58) links to post marked 37; Thence south fifteen (15) degrees eighteen (18) minutes east with magnetic variation at seventeen (17) degrees east, eighteen (18) chains and fifty five (55) links to post marked 37; Thence south eight (8) degrees eight (8) minutes west with magnetic variation at seventeen (17) degrees east eleven (11) chains and ninety-one links to post marked 37; Thence south seventy-four (74) degrees fifty one (51) minutes west with magnetic variation

at seventeen (17) degrees east, eight (8) chains and twenty four (24) links to post marked 37; Thence north eight (8) degrees eight (8) minutes east with magnetic variation at seventeen (17) degrees east, thirteen (13) chains and fifty nine links to post marked 37; Thence north fifteen (15) degrees eighteen (18) minutes west with magnetic variation at seventeen (17) degrees east, sixteen (16) chains and ninety nine (99) links to the place of beginning.

Beginning for the description of the mill site hereby conveyed for the convenient working of the mine at post marked 37, situate at the south east corner of the land survey hereinbefore described; Thence north eight (8) degrees eight (8) minutes east with magnetic variation at seventeen (17) degrees east, eight (8) chains to Ione and Jackson Road eleven (11) chains and ninety one (91) links to post marked 37; Thence north fifteen (15) degrees eighteen (18) minutes west seventy eight (78) links to a post; Thence north seventy four (74) degrees forty two (42) minutes east two (2) chains to a post; Thence south thirteen (13) degrees forty two (42) minutes east eleven (11) chains and seventy three (73) links to a post; Thence south seventy four (74) degrees fifty one (51) minutes west six (6) chains and forty one (41) links to the place of beginning.

The aggregate area hereby conveyed being twenty seven (27) acres and eighty five hundredths (85-100) of an acre of land, more or less, as represented by yellow shading in the following plat.

(Here follows plat.)

NOW KNOW YE: That the United States of America, in consideration of the premises, and in conformity with said acts of Congress, HAVE GIVEN AND GRANTED, and by these Presents do give and grant unto the said Kennedy Mining Company and to their successors and assigns, the said mining premises hereinbefore described as Lot number Forty-four (44) forming a portion of sections seventeen and twenty in township six (6) North of Range eleven east Mt. Diablo Mer. with the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey not herein expressly excepted from these presents, and of two thousand and fourteen and thirty hundredths linear feet of the said Kennedy Quartz Mine, vein, lode, ledge or deposit, as hereinbefore described throughout its entire depth, although it may enter the land adjoining and of all veins, lodes, ledges, or deposits, throughout their depth, the tops or apexes of which lie inside the exterior boundary lines of said survey at the surface extended downward vertically, although such veins, lodes, ledges, or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey;

Provided, That the right of possession hereby granted to such outside parts of said veins, lodes, ledges, or deposits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction that such vertical planes will intersect

such exterior parts of said veins, lodes, ledges or deposits; And provided further that nothing in this conveyance shall authorize the grantees herein, their successors or assigns, to enter upon the surface of a mining claim owned or possessed by another;

TO HAVE AND TO HOLD said mining premises together with the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging unto the said Kennedy Mining Company and to their successors and assigns forever, subject, nevertheless, to the following conditions and stipulations:

First: That the grant hereby made is restricted to the land hereinbefore described as Lot number forty four with two thousand and fourteen and 32-100 linear feet of the Kennedy Quartz Mine, vein, lode, ledge or deposit, throughout its entire depth as aforesaid, together with all other veins, lodes, ledges or deposits throughout their entire depth as aforesaid the tops or apexes of which lie inside of the exterior lines of said survey, and to which no valid adverse claim existed on the tenth day of May, eighteen hundred and seventy-two.

Second: That the premises hereby conveyed, with the exception of the surface may be entered by the proprietor of any other vein, lode, ledge or deposit, the top or apex of which lies outside of the exterior limits of said survey, should the same in its downward course be found to penetrate, intersect, extend into, or underlie the premises hereby granted, for the purpose of extracting and

removing the ore from such other vein, lode, ledge or deposit.

Third: That the premises hereby conveyed shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and right to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs and decisions of courts.

Fourth: That in the absence of necessary legislation by Congress, the Legislature of California may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete development.

IN TESTIMONY WHEREOF, I, ULYSSES S. GRANT, President of the United States of America, have caused these Letters to be made patent and the Seal of the General Land Office to be hereunto affixed.

GIVEN under my hand at the City of Washington, the twenty-ninth day of July, in the year of our Lord one thousand eight hundred and seventy two, and of the Independence of the United States, the Ninety Seventh.

By the President, U. S. GRANT,

By Z. B. STURGUS, Asst. Secretary.

(Seal of (U. S. Gen.) (Land Office)) C. B. Boynton, Recorder of the General Land Office, Recorded Vol. 4, pages 293 to 300.

Examined."

XII.

That thereafter, to wit, on the 28th day of December, 1886, said Kennedy Mining Company conveyed to said Kennedy Mining and Milling Company all the property and rights conveyed to it the said Kennedy Mining Company, by means of said letters Patent and the only title claimed or asserted by said Kennedy Mining Company in and to said Kennedy Mine is such as is established by the said United States patent.

XIII.

That on the 16th day of June, 1871, the United States Surveyor General for the State of California, issued his instructions to said William L. McKim to make survey for patent for said Pioneer Quartz Mine.

XIV.

That in pursuance of said instructions, said William L. McKim on September 1st, 1871, completed his survey for patent of said Pioneer Quartz Mine, and thereupon returned said survey to the United States Surveyor General's Office, and on the 21st day of December, 1871, said Surveyor General approved said survey.

That said return of survey of said Pioneer Quartz Mine as so approved by said Surveyor General was and is in the words and figures following, to wit:

"FIELD NOTES.

Of the Survey of that certain Gold bearing Quartz Vein or Lode of Gold bearing Quartz Rock known as the

Pioneer Mine

In the Jackson Mining District, and numbered 48, Section 20, Township 6 North, Range 11 East Mount Diablo Meridian, in the County of Amador, State of California, by William L. McKim, United States Deputy Mineral Surveyor, in pursuance with special instructions from J. R. Hardenbergh, U. S. Surveyor General for California, bearing date the 10th day of June A. D. 1871.

Survey commenced, August 31, 1871.
Survey completed, September 1, 1871.

Field Notes

Of the line along the vein or lode are as follows, viz:

Beginning at a post marked 46 standing at the southern boundary of said line, from which the ¼ section post between section 20 and 21, Township 6 North, Range 11 East of Mount Diablo Meridian bears

| | | |
|---|---|---|
| Chain 23.91 | N. 89° 36′ E. | Variation 17° E. Distant A. White Oak, 30 in. dia. bears N. 86° 44′ W. O. 40 chs. dist. A black Live Oak Stump (and second growth) 30 in diam bears S. 78° 44′ E. 1.34 chs. dist. |

Thence

N. 19° 14′ W. along said line of vein

Variation 17° E.

| Chains | |
|---|---|
| 2.14 | An open cut on the West of the line. |
| 2.68 | An open cut on the East of the line. |
| 9.00 | An open cut on the East of the line. |
| 19.34 | A shaft 60 feet deep. |
| 22.99 | A shaft 20 feet deep. |
| 23.09 | South end of open cut on the vein. |
| 24.09 | North end of open cut and post marked 37 and 46, and common to the southern boundary of the center line of the Kennedy Quartz Mine, and Northern boundary of the center line of the Pioneer Quartz Mine, from which A Pine, 8 in. dia. bears N. 2° 20′ E. 0.47 chs. dist. A Pine 6 in diam. bears S. 63° 54′ E. 0.91 chs. dist. |

Field Notes.

Of the exterior boundaries of the land claimed with the Pioneer Mine are as follows, to wit:

Beginning at a post marked 46, from which the ¼ Section post on the line between Sections 20 and 21 bears

| Chains | | |
|---|---|---|
| | N. 89° 36′ E. | Variation 17° E. |
| 20.11 | | Distant, Thence |
| | S. 89° 36′W. | Variation 17° E. |
| 3.80 | | A post marked 46 and Southern boundary of the center line of said Vein or Lode. |
| 7.80 | | Set a post marked 46 and S. W. corner of the land claimed |
| | N. 19° 14′ W. | with said Mine. Thence along the Western boundary of said land. |
| | | Variation 17° E. |
| 23.07 | | Set a post marked 46 and N. W. corner of the land claimed with the Pioneer Quartz Mine, from which a post marked 37 at the S. W. corner of the land claimed with the Kennedy |
| | S. 74° 51′ W. | Mine bears, 32 links distant. |
| | N. 74° 51′ E. | Thence, along the Southern boundary of the land claimed with the Kennedy Mine, a post |
| 3.80 | | marked 37 and 46 and common to the Southern boundary of the center line of the Vein or Lode of the Kennedy Mine and Northern boundary of the center line of the Vein or Lode of the Pioneer Mine. |

| | | |
|---|---|---|
| 7.60 | | Set a post marked 46 at the N. E. corner of the land claimed with the Pioneer Mine, from |
| Chains | | which a post marked 37 at the S. E. corner of the land claimed with the Kennedy |
| | N. 74° 51′ E. | Mine, bears 32 links distant. |
| | S. 19° 14′ E. | Thence, along the Eastern line of said claim. |
| | | Variation 17° E. |
| 3.50 | | Entrance of tunnel on the east |
| 4.03 | | end of line. Set a post marked 46 for S. W. corner of land claimed as a Mill Site. |
| 4.25 | | Entrance of Tunnel on the West of line. |
| 24.50 | | Set a post marked 46. Thence |
| | South | Variation 17° E. |
| 0.57 | | To place of beginning, containing 18.23 acres. |

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Field Notes

Of the exterior boundaries of the land claimed with the Pioneer Mine as a Mill Site.

Beginning at a post marked 46 and N. E. corner of the land claimed with the Pioneer Mine. Thence,

Chains N. 74° 51′ E. along the Southern boundary

of the lands of the Kennedy Mine and Mill Site.

Variation 17° E.

0.32 A post marked 37 and S. E. corner of the land claimed with the Kennedy Mine and S. W. corner of land claimed as a Mill Site.

Chains

6.73 A post marked K. M. S. and S. E. corner of land claimed with the Kennedy Mine as a Mill Site. Thence

S. 37° 38′ E. Variation 17° E.

7.05 Set a post for S. E. corner Thence

S. 89° 36′ W. Variation 17° E.

9.55 A post marked 46 at the intersection of the East line of the land claimed with the Pioneer Mine. Thence

N. 19° 14′ W. along the Eastern boundary of the land claimed with said Mine.

Variation 17° E.

4.03 To the place of beginning.

Containing 3.99 acres.

Report.

U. S. Deputy Surveyors Office.
Jackson, Novr 14, 1871.

Hon. J. R. Hardenbergh
U. S. Surveyor General
For California

Sir:

In compliance with Instructions from your office, bearing date June 16th 1871, I herewith submit the following report and return of the improvements and character of the same; in and upon that certain Gold-bearing Quartz Vein or Lode of Gold-bearing Quartz Rock, Known as the Pioneer Mine, situate in Jackson Mining District, Section 20, Township 6 North, Range 11 East, Mount Diablo Meridian, County of Amador, State of California.

Total value of labor and improvements.

From the affidavits of S. W. Brignt, C. Weller and Frank Hoffman, herewith exhibited and marked respectively, Exhibits "C," "D" and "E," and made a part of this return and report.

The least amount set forth in said affidavits as the value of labor and improvements in and upon said Pioneer Mine, is Seven Thousand Dollars.

Character of improvements.

1st One Timbered Tunnel 684 feet in length.
One Tunnel 100 feet in length.
One Tunnel 60 feet in length.

2nd One shaft 4 x 6 feet, 75 feet in depth.
One shaft 4 x 6 feet, 75 feet in depth.

3rd Several open cuts and prospect holes.

There is no mill attached to the Mine.

The general dip of the vein is about 45° and dips to the East.

The elevation of the mine above the sea is about 1300 feet, and it is situated on the main road from Jackson to Sutter.

Very respectfully
Your obt servt
William L. McKim
U. S. Mineral Surveyor
For Amador Co Cala.

## LIST OF NAMES.

A list of the names of the individuals employed to assist in running, measuring, or marking the lines and corners described in the foregoing Field Notes of the Final Survey of that certain Mining Claim Known as the Pioneer Mine No. 46 a Gold bearing Quartz vein or lode of gold bearing quartz rock in the Jackson Mining District, Section 20, T. 6 N. R. 11 E. of Mt. Diablo Meridian Amador Co Cala showing the respective capacities in which they acted.

William L. McKim, U. S. Dept. Surveyor Compassman.
D. D. Reaves, Chainman.
James F. Purslowe, Chainman.
....., Axeman.

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FINAL OATHS OF ASSISTANTS.

We hereby certify that we assisted William L. McKim, U. S. Mineral Deputy Surveyor, in surveying that certain Gold bearing Quartz Vein, or Lode of Gold bearing Quartz Rock, known as the Pioneer Mine in Jackson Mining District, No. 46 Township 6 North Range 11 East of Mt. Diablo Meridian, and that said survey has been in all respects, to the best of our knowledge and belief, well and faithfully surveyed, and the boundary monuments planted according to the instructions furnished by the Surveyor-General.

D. D. Reaves.
James F. Purslowe.

Subscribed and Sworn to before me this 1st day of September, 1871.

William L. McKim,
U. S. Deputy Surveyor.

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FINAL OATH OF DEPUTY SURVEYOR.

I, William L. McKim, U. S. Mineral Deputy Surveyor, do solemnly swear that, in pursuance with Instructions

from J. R. HARDENBERGH, United States Surveyor-General for California, bearing date the 16th day of June A. D. 1871, I have well, faithfully and truly, in my own proper person, and in strict conformity with the instructions furnished by the Surveyor-General, the Surveying Manual, and the laws of the United States, surveyed all those parts or portions of that certain Mining Claim, Known as the Pioneer Mine, a Gold bearing Quartz Vein or Lode of Gold bearing Quartz Rock, situate in the Jackson Mining District, Section 20, Township 6 North, Range 11 East of Mount Diablo Meridian, County of Amador, State of California, as are represented in the foregoing Field Notes as having been surveyed under my direction; and I do further solemnly swear that all the corners of said surveys have been established and perpetuated in strict accordance with the Surveying Manual and printed instructions, and that the foregoing are the true and original Field Notes of such Survey.

William L. McKim,
U. S. Deputy Surveyor.

Subscribed and sworn to before me, this 4th day of December, 1871.

R. M. BRIGGS,
United States Commissioner for
Amador County California."

XV.

That thereafter and on the 23rd day of February, 1872, the said Pioneer Gold and Silver Mining Company en-

tered and paid for said mining claim as so surveyed by said William L. McKim, and the Receiver of said United States Land Office thereupon issued his duplicate receipt evidencing such entry and payment.

XVI.

That thereafter to wit, on the 12th day of August, 1872, the Government of the United States issued to said Pioneer Gold and Silver Mining Company its certain Letters Patent of which the following is a copy:

"GENERAL LAND OFFICE

No. 406.

MINERAL CERTIFICATE

No. 63.

"THE UNITED STATES OF AMERICA,

To all to whom these Presents shall come, GREETING:

WHEREAS, in pursuance of the Act of Congress approved July twenty sixth, eighteen hundred and sixty six, entitled "An Act granting the right of way to ditch and canal owners over the public lands, and for other purposes," the act amendatory thereof, approved July ninth eighteen hundred and seventy; and the act approved May tenth, eighteen hundred and seventy-two, entitled "An Act to promote the development of the mining resources of the United States" there have been deposited in the General Land Office of the United States the plat and field notes of survey of the claim of the Pioneer Gold and Silver Mining Company upon the Pioneer Quartz lode bearing gold, accompanied by the Certificate of the Reg-

ister of the Land Office at Sacramento, in the State of California, whereby it appears that in pursuance of said Acts of Congress, the Pioneer Gold and Silver Mining Company did, on the 23rd day of February, A. D. 1872, enter and pay for said mining claim or premises, being mineral entry No. 63, in the series of said office, designated by the Surveyor General as Lot Number forty-eight (48) embracing a portion of the north-east quarter of section twenty (20) in Township six north of range eleven east Mt. Diablo Meridian in the Jackson Mining District, in the County of Amador and State of California, in the district of lands subject to sale at Sacramento, embracing twenty-two and twenty-two hundredths (22.22) acres of land, more or less, and according to the returns on file in the General Land Office, bounded, described and platted as follows, with magnetic variation at seventeen (17) degrees east, to wit:

Beginning for the description of said land claimed with said lode at a post marked 46, from which the quarter section corner between sections twenty (20) and twenty-one (21) in Township six (6) north of range eleven (11) east, Mount Diablo Meridian, bears north eighty-nine (89) degrees thirty-six (36) minutes east at the distance of twenty (20) chains and eleven (11) links; thence from said post marked 46 south eighty-nine (89) degrees thirty six (36) minutes west three (3) chains and eighty (80) links to post marked 46 at southern end of said lode, seven (7) chains and eighty (80) links to post marked 46; Thence north nineteen (19) degrees fourteen (14) minutes west

twenty three (23) chains and seven (7) links to post marked 46 at the north west corner of the claim, from which post marked 37 situate at the south-west corner of the Kennedy Company's claim, upon the Kennedy mine bears south seventy four (74) fifty one (51) minutes west at the distance of thirty two (32) links; Thence from said post marked 46 north seventy four (74) degrees fifty one (51) minutes east along the southern boundary of the Kennedy Company's claim three (3) chains and eighty (80) links to post marked 37 and 46—the same being situate at the northern end of the said Pioneer Gold and Silver Mining Company's claim and at the southern end of the said Kennedy Company's claim, seven (7) chains and sixty (60) links to post marked 46, from which a post marked 37 situate at the south east corner of the said Kennedy Company's claim bears north seventy four (74) degrees fifty one (51) minutes east at the distance of thirty two (32) links; Thence from said post marked 46 south nineteen (19) degrees fourteen (14) minutes east, four (4) chains and three (3) links to post marked 46, situate at the southwest corner of the mill site hereby conveyed, twenty-four (24) chains and fifty (50) links to post marked 46; thence south fifty-seven (57) links to the place of beginning, containing eighteen (18) acres and twenty three hundredths (23-100) of an acre of land, more or less.

Beginning for the description of the mill site hereby conveyed for the convenient working of the mine at a post marked 46, situate at the north east corner of the land hereinbefore described; Thence North seventy-four (74)

degrees fifty one (51) minutes east along the southern boundary of the Kennedy Company's mill site thirty two (32) links to a post marked 37 situate at the south west corner of said Kennedy Company's mill site, six (6) chains and seventy three (73) links to a post marked K. M. S. situate at south east corner of said Kennedy Company's Mill site; Thence South thirty-seven (37) degrees thirty eight (38) minutes east seven (7) chains and five (5) links to post; Thence south eighty nine (89) degrees thirty six (36) minutes west nine (9) chains and fifty five (55) links to post marked 46 hereinbefore described as situate at the southwest corner of said mill site; Thence north nineteen (19) degrees fourteen (14) minutes west four (4) chains and three (3) links to the place of beginning, containing three (3) acres and ninety nine hundredths (99-100) of an acre of land, more or less, which together with the land claimed with said lode, aggregates twenty two (22) acres and twenty two hundredths (22-100) of an acre of land, more or less, as represented by yellow shading in the following plat.

(Here follows plat.)

NOW KNOW YE, That the United States of America in consideration of the premises and in conformity with the said acts of Congress, HAVE GIVEN AND GRANTED, and by these presents do give and grant, unto the said Pioneer Gold and Silver Mining Company and to their successors and assigns the said mining premises hereinbefore described as Lot number forty-eight (48) embracing a portion of the north east quarter of section

twenty (20) in township six (6) north of Range eleven (11) east Mt. Diablo Meridian, with the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey not herein expressly excepted from these presents, and of fifteen hundred and eighty-nine and 94-100 linear feet of the said Pioneer Quartz vein, lode, ledge or deposit, as hereinbefore described throughout its entire depth, although it may enter the land adjoining, and of all the veins, lodes, ledges or deposits throughout their entire depth, the tops or apexes of which lie inside the exterior boundary lines of said survey at the surface extended downward vertically, although such veins, lodes, ledges or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey;

PROVIDED, That the right of possession hereby granted to such outside parts of said veins, lodes, ledges or deposits, shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface so continued in their own direction that such vertical planes will intersect such exterior parts of said veins, lodes, ledges or deposits.

AND PROVIDED FURTHER, That nothing in this conveyance shall authorize the grantees herein, their successors or assigns to enter upon the surface of a mining claim owned or possessed by another;

TO HAVE AND TO HOLD said mining premises, together with all the rights, privileges, immunities and ap-

purtenances of whatsoever nature thereunto belonging, unto the said Pioneer Gold and Silver Mining Company and to their successors and assigns forever, subject nevertheless, to the following conditions and stipulations:

First--That the grant hereby made is restricted to the land hereinbefore described as Lot Number forty-eight (48) with fifteen hundred and eighty nine and 94-100 linear feet of the Pioneer Quartz vein, lode, ledge or deposit throughout its entire depth as aforesaid together with all other veins, lodes, ledges or deposits throughout their entire depth as aforesaid, the tops or apexes of which lie inside of the exterior lines of said survey, and to which no valid adverse claim existed on the tenth day of May eighteen hundred and seventy two.

Second—That the premises hereby conveyed with the exception of the surface, may be entered by the proprietor of any other vein, lode, ledge or deposit, the top or apex of which lies outside of the exterior limits of said survey, should the same in its downward course be found to penetrate, intersect, extend into, or underlie the premises hereby granted, for the purpose of extracting and removing the ore from such other vein, lode, ledge or deposit.

Third—That the premises hereby conveyed shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and ac-

knowledged by the local laws, customs and decisions of courts.

Fourth—That in the absence of necessary legislation by Congress, the Legislature of California may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete development.

IN TESTIMONY WHEREOF, I, ULYSSES S. GRANT, President of the United States of America, have caused these letters to be made patent, and the Seal of the General Land Office to be hereunto affixed.

GIVEN under my hand at the City of Washington the twelfth day of August in the year of our Lord one thousand eight hundred and seventy two and of the Independence of the United States the ninety-seventh.

BY THE PRESIDENT, U. S. GRANT.
BY Z. B. STURGESS, Asst. Secretary.
(Seal.) C. B. BOYNTON, Recorder of the General Land Office."

Recorded Vol. 4, pages 393 to 401."

XVII.

That attached to said several patents was a plat delineating the boundaries and surface lines described in said patents respectively. Said plat attached to said patent to said Kennedy Mining Company delineates the surface ground as the same is marked and designated on "Exhibit A," annexed hereto as Lot Forty-four (44) Kennedy Quartz Mine; and the plat annexed to said patent

to said Pioneer Gold and Silver Mining Company delineates the surface ground described in said last named patent as shown upon "Exhibit A" annexed hereto, marked Lot forty-eight (48) Pioneer Quartz Mine.

XVIII.

That the line A—B— marked upon the diagram "Exhibit A" is the northern end line of said Pioneer Quartz Mine as patented, and to the extent of the length of said line, to wit: seven (7) chains and sixty (60) links, is coincident with the southern end line of said Kennedy Quartz Mine as described in said Patent to said Kennedy Mining Company.

The course of said line A—B— is north seventy-four (74) degrees fifty-one (51) minutes east. The dotted line B—B′ is said line A—B— produced indefinitely in its own direction.

XIX.

That said Argonaut Mining Company has sunk an incline shaft which has its collar or top in the Pioneer Mill Site described in said patent to said Pioneer Gold and Silver Mining Company at a point marked "B" on said diagram "Exhibit A," and descends into the earth downward from its collar easterly at an average angle approximately sixty-two degrees from the place of the horizon.

XX.

Traversing said Kennedy and Pioneer Mines in a general northerly and southerly direction is a ledge of rock

in place bearing gold. It is a well defined vein varying in width from three inches to thirty feet lying between well defined walls, and dips and descends into the earth easterly at an average angle of approximately forty degrees from the plane of the horizon until it reaches a point in said Argonaut shaft about four hundred and forty feet below the collar or top thereof below which point said vein dips and descends into the earth easterly at an average angle of approximately sixty three degrees from the plane of the horizon, the general easterly direction of said dip of said vein being indicated by the arrows on "Exhibit A."

XXI.

The general course of said vein is S. 19° 14′ E. or N. 19° 14′ W. as is apparent on the surface by the outcrop visible in said Pioneer Mine Lot 48. Said vein in its course southerly passes out of said Kennedy Quartz Mine crossing said line A—B at a point thereon marked "Z" on said "Exhibit A," and enters the Pioneer ground, thence pursuing its general southerly course towards the southern end line of said Pioneer Quartz Mine, which it crosses.

XXII.

Within the surface boundary of the tract designated on "Exhibit A" as the Kennedy Mill Site, and at the point marked "X" on "Exhibit A" the Kennedy Mining and Milling Company have sunk a shaft, which is vertical or nearly so to the depth of Three hundred and seventy six

feet, or thereabouts, at which depth it encounters the vein or ledge above described, as it descends into the earth from the overlying apex or outcrop.

Thence said shaft is an incline following the vein on its dip or downward course into the earth to a present depth of approximately two thousand two hundred and fifty feet.

XXIII.

From said shaft the defendant herein has extended certain levels and drifts southerly on said vein, some of which are shown in horizontal projection on the diagram marked " Exhibit A " hereto annexed and marked respectively 1450, 1550, 1650 and 1750 levels. Some of these levels have been by said defendant extended on said vein southerly and beyond a vertical plane drawn through the line A—B produced in the direction of B′.

That between the 8th day of October, 1895, and the 12th day of December, 1895, the defendant extracted, removed and converted to its own use Two Thousand Six Hundred and Four (2604) tons of gold bearing ore from said vein southerly from and beyond said vertical plane, but within the vertical boundaries of the Silva Quartz Mine delineated on said Exhibit A, and hereinafter described.

That the gross value of said 2604 tons of said ore so extracted, removed and converted by defendant was the sum of Sixty two thousand two hundred and eighteen 45-100 (62,218.45) Dollars.

That the aggregate cost of mining and milling said ore

was the sum of Six thousand one hundred and nineteen 40-100 (6119.40) Dollars, which amount plaintiff consents may be deducted from the gross value of the ore as above stated, in the event the Court should determine that Plaintiff is entitled to recover in this action.

The net profit realized by said defendant from said ore was the sum of Fifty six thousand and ninety-nine 95-100 (56,099.95) Dollars in gold.

XXIV.

That the vein exposed in defendant's underground workings south of the vertical plane drawn through the line A—B produced in the direction B′ is the same vein which has its top or apex in the Kennedy Quartz Mine and in the Pioneer Quartz Mine, and that such vein is continuous from the top or apex in both properties downward to the lowest depths, and that said vein at all points below the surface continues on its course in a general southerly direction indefinitely towards the south end line of the Pioneer Quartz Mine, which it crosses, and that the aforesaid 2604 tons of ore were extracted by defendant from said vein south of said vertical plane drawn through the line A—B—B′.

XXV.

Said vein is the identical vein mentioned in the Kennedy Patent as the Kennedy vein or lode and in the Pioneer Patent as the Pioneer vein or lode.

XXVI.

That plaintiff became the owner of said Pioneer Quartz Mine by deed duly executed July 3, 1893, by the Pioneer Gold and Silver Mining Company, the patentee named in the Pioneer Patent hereinbefore described, and has ever since been and now is such owner.

XXVII.

That the defendant became the owner of said Kennedy Mine by mesne conveyances from the patentee by deed dated December 28th, 1886, and has ever since and now is such owner.

XXVIII.

Delineated upon said diagram hereto annexed marked "Exhibit A" is a property known as the Silva Quartz Mine, Lot No. 86. The surface of said Silva Quartz Mine overlies so much of the dip of said Pioneer and Kennedy vein as may be found between vertical planes drawn downward through the boundaries of said Silva Quartz Mine. That the defendant is and ever since the sixth day of February, 1893, has been the owner of said Silva Quartz Mine by virtue of a quartz mining patent issued to it on that day under the mining laws of Congress which patent is in the words and figures as follows, to wit:

"GENERAL LAND OFFICE, NO. 22540.

MINERAL CERTIFICATE, NO. 1521.

THE UNITED STATES OF AMERICA.

To all to whom these Presents shall come, GREETING: WHEREAS, in pursuance of the provisions of the Revised Statutes of the United States, Chapter Six, Title Thirty-two and Legislation supplemental thereto, there have been deposited in the General Land Office of the United States the Plat and Field Notes of survey and the Certificate No. 1521, of the Register of the Land Office at Sacramento, in the State of California, accompanied by other evidence, whereby it appears that The KENNEDY MINING AND MILLING COMPANY did, on the thirteenth day of October A. D. 1892, duly enter and pay for that certain mining claim or premises known as the Silva Quartz Lode Mining Claim, designated by the Surveyor General as Lot No. 86, embracing a portion of Section Twenty, in Township Six, North of Range eleven east, Mount Diablo Meridian, in the Jackson Mining District, in the County of Amador and State of California in the District of Lands subject to sale at Sacramento and bounded, described and platted as follows, with magnetic variation as hereinafter stated.

Beginning at an iron post situate at the north east corner of Lot No. 61, the Volunteer Quartz Lode claim.

Thence, first course magnetic variation sixteen degrees and thirty-five minutes east, north sixty degrees and thirty one minutes east, thirty-five feet to a post marked "X."

Thence, second course, magnetic variation sixteen degrees and thirty five minutes east, south thirty five de-

grees and ten minutes east one hundred and sixty seven feet to a post marked " IX."

Thence, third course, magnetic variation sixteen degrees and thirty-five minutes east, north eighty nine degrees and forty five minutes east one hundred and three feet to a post marked " VIII," from which a shaft bears South sixty-four degrees and twenty minutes east one hundred and twenty six feet distant; and a shaft bears north fifty six degrees and ten minutes east three chains and thirty four links distant.

Thence, fourth course, magnetic variation, sixteen degrees, and twenty five minutes east, north twenty four minutes west four hundred and seventy feet to a post marked " VII."

Thence, fifth course, magnetic variation fifteen degrees and fifty five minutes east, north eighty nine degrees and twenty minutes east two hundred and thirteen and two tenths feet to a post five inches square marked " V," in mound of stone, from which a blazed live oak five inches in diameter bears north fifty degrees and fifteen minutes east forty three and one half links distant; and the corner common to sections sixteen, seventeen, twenty and twenty one, in township six North of range eleven east, Mount Diablo Meridian bears north eighty nine degrees and twenty minutes east ten chains distant.

Thence, sixth course, magnetic variation fifteen degrees and thirty nine minutes east, south ten minutes east, one thousand three hundred and six and eight

tenths feet to a post marked "IV," being the southeast corner of claim.

Thence, seventh course, magnetic variation sixteen degrees and twenty-five minutes east, south eighty-nine degrees and twenty minutes west, six and six tenths feet to an iron bar two inches in diameter, projecting three inches above ground, situate in a gate way.

Thence, eighth course, magnetic variation sixteen degrees and twenty-five minutes east, north thirty one degrees and forty eight minutes west, six hundred and sixty three and three tenths feet to a post marked "II."

Thence, ninth course, magnetic variation sixteen degrees and thirty five minutes east, north twelve degrees and forty minutes west, three hundred and ninety eight feet to said iron post, the place of beginning; said lot No. 86 extending one thousand three hundred and sixteen and seven tenths feet in length, along said Silva Quartz vein or lode, and containing seven acres and two [illegible] hundredths of an acre of land, more or less.

NOW KNOW YE, That there is therefore hereby GRANTED by the United States unto the said Kennedy Mining and Milling Company and to its successors and assigns, the said mining premises hereinbefore described, and not expressly excepted from these presents, and all that portion of the said Silva Quartz vein, lode or ledge, and of all other veins, lodes and ledges, throughout their entire depth, the tops or apexes of which lie inside of the surface boundary lines of said granted premises in said Lot No. 86 extended downward vertically, although such

veins, lodes, or ledges in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said premises; Provided, That the right of possession to such outside parts of said veins, lodes or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said Lot No. 86, so continued in their own direction that such planes will intersect such exterior parts of said veins, lodes or ledges: And Provided Further, That nothing herein contained shall authorize the grantee herein to enter upon the surface of a claim owned or possessed by another.

TO HAVE AND TO HOLD said mining premises, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging unto the said grantee above named and to its successors and assigns forever; subject nevertheless to the above mentioned and to the following conditions and stipulations:

First: That the premises hereby granted, with the exception of the surface, may be entered by the proprietor of any other vein, lode or ledge, the top or apex of which lies outside of the boundary of said granted premises, should the same in its dip be found to penetrate, intersect, or extend into said premises, for the purpose of extracting and removing the ore from such other vein, lode or ledge.

Second: That the premises hereby granted shall be held subject to any vested and accrued water rights for

mining, agricultural, manufacturing or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs and decisions of the Courts. And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

Third. That in the absence of necessary legislation by Congress, the Legislature of California may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete development.

IN TESTIMONY WHEREOF, I, BENJAMIN HARRISON, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

GIVEN under my hand at the City of Washington the sixth day of February in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the one hundred and seventeenth.

BY THE PRESIDENT; BENJAMIN HARRISON.

By E. Macfarland, Asst. Secretary.

(Seal of ) D. P. Roberts,
(the U. S.) Recorder of the General Land Office."
(Gen. L. O.)

Recorded Vol. 234, pages 57 to 60 inclusive."

IT IS NOW STIPULATED AND AGREED that this cause be forthwith submitted to the Court upon the foregoing agreed statement of facts and stipulations together with the facts established by the pleadings, for its decision upon the respective rights of the parties and for judgment accordingly.

Nothing herein shall be construed to deprive either party of the right to appeal or sue out a writ of error to the appropriate tribunal having jurisdiction for the purpose of reviewing any judgment which may be entered pursuant to decision rendered as contemplated in this stipulation, but the right to have said judgment reviewed by the Appellate Courts by appropriate proceedings in that behalf is expressly reserved by both parties.

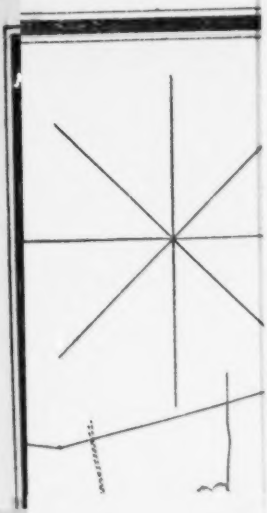
Dated, September 13th, 1898.

LINDLEY & EICKHOFF,
W. J. McGEE,
F. J. SOLINSKY,
Attorneys for Plaintiff.

JOHN M. WRIGHT,
BYRON WATERS,
JOHN J. SNYDER,
Attorneys for Defendant.

[Endorsed]: Formerly No. 1408 in the Superior Court of Amador County. In the Superior Court of Calaveras County, State of California. Argonaut Mining Company, Plaintiff, vs. Kennedy Mining & Milling Company, De-

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FOLD OUT IS TOO LARGE TO BE FILMED

fendant. Agreed Statement of Facts. Filed Sept. 14, 1898. A. L. Wyllie, Clerk. By W. S. Coulter, Deputy.

## 4. STIPULATION EXTENDING TIME FOR FILING OBJECTIONS.

IN THE

# Superior Court of the County of Calaveras,

STATE OF CALIFORNIA.

ARGONAUT MINING COMPANY, *Plaintiff*,

vs.

KENNEDY MINING AND MILLING COMPANY, *Defendant*.

No. 1408.

**Stipulation Extending Time for Filing Objections.**

Whereas, by stipulation heretofore made herein, a certain statement of the facts in this case was agreed upon; and

Whereas, in said stipulation it was provided that "each or either party may serve on the opposite party and file in this cause within twenty days from this date" [Sept. 13, 1898] "a statement in writing setting forth specifically its objections to each fact the admission of which is objected to by it for want of relevancy and materiality to and competency to prove the issues presented by the pleadings or for want of relevancy or materiality

to or competency to prove such issues, and such written statement of objections shall be deemed and taken as part of the record of the cause and the objections therein stated shall be ruled upon by the Court the same as though made in open court or as though specifically set forth in this stipulation."

Now it is hereby stipulated and agreed that the time for serving and filing such objections is hereby extended to and to include the 12th day of October, 1898.

LINDLEY & EICKHOFF,
W. J. McGEE, and
F. J. SOLINSKY,
Attorneys for Plaintiff.

JOHN M. WRIGHT,
BYRON WATERS,
JOHN J. SNYDER,
Attorneys for Defendant.

[Endorsement]: No. 1408. In the Superior Court of the County of Calaveras, State of California. Argonaut Mining Co., Plaintiff, v. Kennedy Mining and Milling Company, Defendant. Stipulation extending time for filing objections. Filed October 4th, 1898. A. L. Wyllie, Clerk.

## 5. DEFENDANT'S OBJECTIONS TO CERTAIN FACTS IN THE AGREED STATEMENT.

IN THE

# Superior Court of the County of Calaveras,

STATE OF CALIFORNIA.

ARGONAUT MINING COMPANY,
*Plaintiff*,

vs.

KENNEDY MINING AND MILLING COMPANY,
*Defendant*.

No. 1408.

**Defendant's Objections.**

Whereas, by stipulation heretofore made herein, a certain statement of the facts in this cause was agreed upon, and

Whereas, in said stipulation it was provided that "each or either party may serve on the opposite party and "file in this cause within twenty days from this date" (Sept. 13th, 1898) "a statement in writing setting forth "specifically its objections to each fact the admission of "which is objected to by it for want of relevancy and "materiality to and competency to prove the issues pre- "sented by t' e pleadings or for want of relevancy or

"materiality to or competency to prove such issues, and "such written statement of objections shall be deemed "and taken as part of the record of the cause and the ob- "jections therein stated shall be ruled upon by the court "the same as though made in open court or as though "specifically set forth in this stipulation."

NOW IN ACCORDANCE WITH THE RIGHT SO STIPULATED AND RESERVED, THIS DEFENDANT HEREBY SPECIFICALLY SETS FORTH, MAKES AND CLAIMS ITS OBJECTIONS TO THE ADMISSION OR CONSIDERATION BY THE COURT AS EVIDENCE OR AS POSSESSING PROBATIVE FORCE HEREIN, OF THOSE CERTAIN FACTS SPECIFIED IN SAID AGREED STATEMENT AS FOLLOWS, to-wit:

*First.* All and singular each and every the facts stated in paragraph IV of said agreed statement, showing among other matters and things, the corporate capacity of Kennedy Mining Company;

*Second.* All and singular each and every the facts stated in paragraph V of said agreed statement, showing among other matters and things, that on October 13, 1870, said Kennedy Mining Company applied for a patent to the Kennedy Quartz Mine, Lot No. 44, and that a diagram of said mine was posted in the U. S. Land Office at Sacramento, California, on October 15, 1870;

*Third.* All and singular each and every the facts stated in paragraph VII of said agreed statement, show-

ing among other matters and things, that there was a certain surface conflict as to area claimed by said Kennedy Mining Company and adversely claimed by Pioneer Gold and Silver Mining Company, and that on January 13, 1871, the Register and Receiver of the Land Office at Sacramento, California, made and entered an order setting forth said surface conflict, and suspending said patent proceedings of said Kennedy Mining Company pending an adjustment of said surface conflict;

*Fourth.* All and singular each and every the facts stated in paragraph VIII of said agreed statement, showing among other matters and things, that on February 20, 1871, said Kennedy Mining Company and said Pioneer Gold and Silver Mining Company entered into an agreement in writing adjusting their said conflict as to said surface area, and that said agreement was filed in the U. S. Land Office at Sacramento, California, said agreement being set forth in *haec verba* in said paragraph VIII;

*Fifth.* All and singular each and every the facts set forth in paragraph IX of said agreed statement, showing among other matters and things, that on March 15, 1871, the U. S. Surveyor General for California instructed William L. McKim, a U. S. Deputy Mineral Surveyor, to make patent survey of said Kennedy Quartz Mine;

*Sixth.* All and singular each and every the facts stated in paragraph X of said agreed statement, showing among other matters and things, that said McKim surveyed said Kennedy Quartz Mine during April and May,

1871, and thereupon returned said survey to the U. S. Surveyor General's Office, and that on October 19, 1871, said Surveyor General approved said survey, and that on November 11, 1871, said Kennedy Mining Company entered and paid for the mining claim so surveyed.

Defendant bases its aforesaid objections to the admission as evidence herein of the facts aforesaid, upon the following grounds, to-wit:

(*a*) All and singular each and every the facts so objected to, are immaterial and irrelevant to all and singular each and every the issues in this cause; and

(*b*) All and singular each and every the facts so objected to, are incompetent as evidence to limit or enlarge or explain or anywise to control or modify or affect the terms or provisions or legal effect of the patent issued to said Kennedy Mining Company for said Kennedy Quartz Mine, Lot No. 44, on July 29, 1872, as shown by paragraph XI of said agreed statement; and

(*c*) All and singular each and every the facts so objected to, relate only to the surface area to be embraced within said Kennedy Quartz Mine, Lot No. 44, and in no wise relate to any extra lateral right claimed as attaching to said Kennedy Quartz Mine, Lot No. 44, nor to any right or interest in any part of any lode or lodes lying outside the vertical boundaries of said Lot No. 44; and

(*d*) The agreement as to the common boundary line between said Kennedy Quartz Mine and the Pioneer Quartz Mine, set out in paragraph VIII of said agreed statement, is not recited nor referred to in said patent to

said Kennedy Quartz Mine, nor was said agreement ever recorded in the office of the County Recorder of the County of Amador, State of California, in which said Kennedy Quartz Mine is situate, nor is it alleged in the complaint herein that this defendant was a party to said agreement, nor that this defendant ever had any notice or knowledge of the existence of the same at the time it acquired its title to said Kennedy Quartz Mine, Lot No. 44, or at the time when it acquired its title to the Silva Quartz Mine, Lot No. 86, the patenting of which is shown by the facts set forth in paragraph XXVIII of said agreed statement; and

(c) Defendant specially sets up and claims that all and singular each and every the facts set forth in said paragraphs IV, V, VII, VIII, IX and X of said agreed statement, are irrelevant and immaterial to all and singular each and every the issues in this cause and are incompetent as evidence to prove any of the facts alleged in the complaint herein, because, as is shown by the facts set forth in paragraph XXIII of said agreed statement, all of the ores in dispute herein were extracted by defendant from places within the vertical boundaries of said Silva Quartz Mine, and without the vertical end boundaries of said Kennedy Quartz Mine indefinitely extended, and because, notwithstanding the existence of the facts set forth in said paragraphs IV, V, VII, VIII, IX and X of said agreed statement, this defendant, by reason of its ownership of said Silva Quartz Mine, Lot No. 86, which ownership is shown by the facts set forth in para-

graph XXVIII of said agreed statement, was at all of the times of the trespasses alleged in the complaint herein, justly entitled, under the statutes of the United States by authority of which said patent to said Silva Quartz Mine was issued, to-wit, under Chapter Six of Title Thirty-two of the Revised Statutes of the United States and legislation supplemental thereto, to the exclusive right and title to take and hold all of said ores and every part of the substance embraced within the area of said Silva Quartz Mine as described in said Silva patent; and

(f) As shown by the facts stated in paragraph XII of said agreed statement, defendant makes no claim of title or right to the ores forming the subject of dispute in this cause, by reason of its ownership of said Kennedy Quartz Mine, Lot No. 44.

AND DEFENDANT IN LIKE MANNER OBJECTS TO THE ADMISSION AS EVIDENCE HEREIN OF THE FOLLOWING ADDITIONAL FACTS, to-wit:

*Seventh.* All and singular each and every the facts set forth in paragraph XI of said agreed statement, showing among other matters and things, that on July 29, 1872, the government of the United States issued to said Kennedy Mining Company a patent for said Kennedy Quartz Mine, Lot No. 44, said patent being set forth in *haec verba* in said paragraph XI;

*Eighth.* All and singular each and every the facts set forth in paragraph XII of said agreed statement, in so far as such facts show or tend to show that on December 28,

1886, said Kennedy Mining Company conveyed to this defendant all the property and rights conveyed to it, the said Kennedy Mining Company, by means of said letters patent issued July 29, 1872.

Defendant bases its aforesaid objections to such facts set forth in said paragraphs XI and XII of said agreed statement, upon the following grounds, to-wit:

(*a*) All and singular each and every of such facts are immaterial and irrelevant to all and singular each and every the issues in this cause; and

(*b*) Defendant makes no claim of right or title to the ores in dispute in this cause by reason of its ownership of said Kennedy Quartz Mine, Lot No. 44; and

(*c*) Plaintiff cannot establish a title in itself to the ores in dispute in this cause by showing that defendant has no title nor right to said ores by reason of its ownership of the Kennedy Quartz Mine, nor by showing the limitations of the patent to said Kennedy Quartz Mine; but plaintiff must rely upon and clearly show its own title to said ores; and

(*d*) Defendant claims title to the ores in dispute in this cause by reason of its ownership of said Silva Quartz Mine, Lot No. 86, and not by reason of its ownership of said Kennedy Quartz Mine, Lot No. 44.

AND DEFENDANT IN LIKE MANNER OBJECTS TO THE ADMISSION AS EVIDENCE HEREIN OF THE FOLLOWING ADDITIONAL FACTS, to-wit:

*Ninth.* All and singular each and every the facts set

forth in paragraph XVII of said agreed statement, and the facts shown by the plat designated as "Exhibit A" in said paragraph XVII, in so far as such facts show or tend to show the boundary lines and surface form of said Kennedy Quartz Mine, Lot No. 44;

*Tenth.* All and singular each and every the facts set forth in paragraph XVIII of said agreed statement, in so far as such facts show or tend to show the southern end line of said Kennedy Quartz Mine and the coincidence of the northern end line of said Pioneer Quartz Mine with a part of the southern end line of said Kennedy Quartz Mine;

*Eleventh.* All and singular each and every the facts set forth in paragraph XX of said agreed statement, in so far as such facts show or tend to show the existence of a ledge of rock in place bearing gold within said Kennedy Quartz Mine, Lot No. 44, and the nature and extent of said vein within said Kennedy Quartz Mine;

*Twelfth.* All and singular each and every the facts set forth in paragraph XXI of said agreed statement, in so far as such facts show or tend to show the existence and course of a vein in said Kennedy Quartz Mine, Lot No. 44, and that said vein crosses out of said Kennedy Quartz Mine into said Pioneer Quartz Mine;

*Thirteenth.* All and singular each and every the facts set forth in paragraphs XXIV and XXV of said agreed statement, in so far as such facts show or tend to show the existence of a vein or any vein in said Kennedy

Quartz Mine or the identity of such vein or any vein in said Kennedy Mine with the vein from which defendant extracted the ores in dispute south of the line A—B—B' but within the vertical boundaries of said Silva Quartz Mine, Lot No. 86;

*Fourteenth.* All and singular each and every the facts set forth in paragraph XXVII of said agreed statement showing that defendant became the owner of said Kennedy Quartz Mine on December 28, 1886, and ever since has been and now is such owner.

And defendant bases its aforesaid objections to the admission as evidence herein of the aforesaid facts set forth in said paragraphs XVII, XVIII, XX, XXI, XXIV, XXV and XXVII of said agreed statement, on the following grounds, to-wit:

(*a*) All and singular each and every the facts so objected to are immaterial and irrelevant to all and singular each and every the issues in this cause; and

(*b*) Defendant makes no claim of right or title to the ores in dispute in this cause by reason of its ownership of said Kennedy Quartz Mine, Lot No. 44; and

(*c*) Plaintiff must establish its title and right to the ores in dispute in this cause, if at all, by showing that in law as well as in fact, said ores constituted part of the Pioneer Quartz Mine, Lot No. 48, set up in the complaint herein, and not by showing that defendant has no title nor right to said ores by reason of its ownership of the Kennedy Quartz Mine; and

(d) Defendant claims title to the ores in dispute in this cause by reason of its ownership of Silva Quartz Mine, Lot No. 86, and not by reason of its ownership of Kennedy Quartz Mine, Lot No. 44.

AND DEFENDANT IN LIKE MANNER OBJECTS TO THE ADMISSION AS EVIDENCE HEREIN OF THE FOLLOWING ADDITIONAL FACTS, to-wit:

*Fifteenth.* All and singular each and every the facts stated in paragraph VI of said agreed statement, showing among other matters and things, that on January 13, 1871, the Pioneer Gold and Silver Mining Company applied for a patent to the Pioneer Quartz Mine, Lot No. 48, and that a diagram of said Pioneer Quartz Mine was posted in the U. S. Land Office at Sacramento, California, and on said Pioneer Mine;

*Sixteenth.* All and singular each and every the facts stated in paragraph VII of said agreed statement, showing among other matters and things, that there was a certain surface conflict as to area claimed by said Kennedy Mining Company and adversely claimed by Pioneer Gold and Silver Mining Company, and that on January 13, 1871, the Register and Receiver of the Land Office at Sacramento, California, made and entered an order setting forth said surface conflict, and suspending said patent proceedings of said Kennedy Mining Company pending an adjustment of said surface conflict;

*Seventeenth.* All and singular each and every the facts stated in paragraph VIII of said agreed statement, show-

ing among other matters and things, that on February 20, 1871, said Kennedy Mining Company and said Pioneer Gold and Silver Mining Company entered into an agreement in writing adjusting their said conflict as to said surface area, and that said agreement was filed in the U. S. Land Office at Sacramento, California, said agreement being set forth in *haec verba* in said paragraph VIII;

*Eighteenth.* All and singular each and every the facts set forth in paragraph XIII of said agreed statement, showing among other matters and things, that on June 16, 1871, the U. S. Surveyor General for California instructed said William L. McKim to make patent survey of said Pioneer Quartz Mine;

*Nineteenth.* All and singular each and every the facts stated in paragraph XIV of said agreed statement, showing among other matters and things, that said McKim completed his patent survey of said Pioneer Quartz Mine on September 1, 1871, and thereupon returned said survey to the U. S. Surveyor General's Office, and that on December 21, 1871, said Surveyor General approved said survey, the aforesaid return of such survey of said Pioneer Quartz Mine being set forth in *haec verba* in said paragraph XIV of said agreed statement;

*Twentieth.* All and singular each and every the facts set forth in paragraph XV of said agreed statement, showing among other matters and things, that on February 23, 1872, said Pioneer Gold and Silver Mining Company entered and paid for said Pioneer Quartz Mine as so surveyed by said William L. McKim, and that the Re-

ceiver of said U. S. Land Office thereupon issued his duplicate receipt evidencing such entry and payment.

Defendant bases its aforesaid objections to the admission as evidence herein of the facts set forth in said paragraphs VI, VII, VIII, XIV and XV of said agreed statement, upon the following grounds, to-wit:

(*a*) All and singular each and every the facts so objected to are immaterial and irrelevant to all and singular each and every the issues in this cause; and

(*b*) All and singular each and every the facts so objected to are incompetent as evidence to limit or enlarge or explain or anywise to control or modify or affect the terms or provisions or legal effect of the patent issued to said Pioneer Gold and Silver Mining Company for said Pioneer Quartz Mine, Lot No. 48, on August 12, 1872, as shown by paragraph XVI of said agreed statement; and

(*c*) All and singular each and every the facts so objected to relate only to the surface area to be embraced within said Pioneer Quartz Mine, Lot No. 48, and in no wise relate to any extra lateral right claimed as attaching to said Pioneer Quartz Mine, Lot No. 48, nor to any right or interest in any part of any lode or lodes lying outside the vertical boundaries of said Lot No. 48; and

(*d*) The agreement as to the common boundary line between said Kennedy Quartz Mine and said Pioneer Quartz Mine set out in paragraph VIII of said agreed statement, is not recited nor referred to in said patent to said Pioneer Quartz Mine, nor was said agreement ever recorded in the office of the County Recorder of the

County of Amador, State of California, in which said Pioneer Quartz Mine is situate, nor is it alleged in the complaint herein that this defendant was a party to said agreement, nor that this defendant ever had any notice or knowledge of the existence of the same at the time it acquired its title to said Kennedy Quartz Mine, Lot No. 44, or at the time when it acquired its title to said Silva Quartz Mine, Lot No. 86, the patenting of which is shown by the facts set forth in paragraph XXVIII of said agreed statement.

DEFENDANT IN LIKE MANNER OBJECTS TO THE ADMISSION AS EVIDENCE HEREIN OF THE FOLLOWING ADDITIONAL FACTS, to-wit:

*Twenty-first.* All and singular each and every the facts set forth in paragraph XVI of said agreed statement, showing among other matters and things, that on August 12, 1872, the U. S. Government issued to said Pioneer Gold and Silver Mining Company certain letters patent conveying or purporting to convey to said Pioneer Gold and Silver Mining Company the Pioneer Quartz Mine, Lot No. 48, as the same is described in said letters patent, a copy of which is set forth in *hacc verba* in said paragraph XVI, and defendant specially objects to the admission as evidence herein of said letters patent and all and singular each and every the facts, matters and things therein recited;

*Twenty-second.* All and singular each and every the facts set forth in paragraph XXVI of said agreed state-

ment, showing that said Pioneer Gold and Silver Mining Company conveyed said Pioneer Quartz Mine to plaintiff on July 3, 1893, and that plaintiff ever since has been and now is the owner thereof.

Defendant bases its aforesaid objections to the admission as evidence herein, of the facts set forth in said paragraphs XVI and XXVI of said agreed statement, as well as its aforesaid objections to the admission as evidence herein of the aforesaid latters patent to said Pioneer Quartz Mine and the facts, matters and things therein recited, upon the following grounds, to-wit:

(a) All and singular each and every the facts so objected to, including all and singular each and every the said patent to said Pioneer Quartz Mine, Lot No. 48, and the facts, matters and things therein recited and set forth, are immaterial and irrelevant to all and singular each and every the issues in this cause, and are incompetent as evidence to prove the issues herein or any of them and are incompetent as evidence to prove title or right in plaintiff to the ores in dispute in this cause, because: ALTHOUGH IT IS TRUE that the ores in dispute herein were all extracted by defendant from the vein mentioned in the complaint herein and in said agreed statement and in said Pioneer patent as the "Pioneer Vein," and that the apex of said Pioneer vein extends from the center of the south end line of said Lot No. 48 through said lot north nineteen (19) degrees and fourteen (14) minutes west to the center of the north end line thereof, and that all of said disputed ores were extracted by defendant

from points between vertical planes drawn down through the end lines of said Lot No. 48 indefinitely extended in their own directions respectively,—IT IS ALSO TRUE that, as shown by the facts set forth in paragraph XXIII of said agreed statement and by reference to "Exhibit A" referred to in said paragraph XXIII and attached to said agreed statement, all of said disputed ores were extracted by defendant from points on the dip of said vein more than 1300 feet vertically below the surface of the earth and outside of and distant more than 900 feet easterly from the vertical boundaries of said Lot No. 48, to-wit, more than 900 feet easterly from a vertical plane drawn down through the easterly side line of said Lot No. 48, AND IT IS ALSO TRUE that, as shown by said Pioneer patent and by the complaint herein and by reference to said "Exhibit A," the end lines of said Pioneer Quartz Mine, Lot No. 48, are not parallel to each other but, on the contrary, the northern end line thereof in its course from its west end easterly diverges and departs substantially and at a very large angle towards the north from a line parallel to the southern end line thereof, such divergence and departure being to the extent of fourteen (14) degrees and forty-five (45) minutes, the course of said southern end line from its west end easterly being North Eighty-nine (89) degrees and thirty-six (36) minutes east and the course of said northern end line from its west end easterly being north seventy-four (74) degrees and fifty-one (51) minutes east, AND IT IS ALSO TRUE that, as shown by the facts set forth in paragraphs XX, XXII,

XXIII, XXIV and XXV of said agreed statement, said Pioneer Vein dips and extends downward into the earth at such an angle from the plane of the horizon and in such a manner as to pass from and extend out of said Pioneer Quartz Mine easterly through and beyond the vertical east side line thereof into ground lying easterly from said Lot No. 48 and from said vertical east side line thereof and so onward continuously in the direction of the aforesaid divergence between said end lines of said Lot No. 48 to the points above described where defendant extracted from said vein the ores in dispute herein, all of which points are within the vertical boundaries of defendant's Silva Quartz Mine, Lot No. 86, AND IT IS ALSO TRUE that, as shown by said Pioneer patent, the same was issued on the twelfth day of August, 1872, under the provisions of that certain Act of the Congress of the United States approved May 10, 1872, entitled "An Act to promote the Development of the Mining Resources of the United States," and more than three months after said Act of Congress became a law, AND IT IS ALSO TRUE that, under the provisions of said Act of Congress and particularly under the provisions of sections two (2) and three (3) thereof, it was at the time of the issuance of said Pioneer patent, ever since has been and now is, necessary that the end lines of said Pioneer Quartz M'ne, Lot No. 48, should be parallel to each other in order that any extra-lateral right or any right to or interest in any part of said Pioneer vein lying outside the vertical boundaries of said Lot No. 48 should or could attach to said Lot No. 48

and be enjoyed by the owners thereof; AND THEREFORE and because the end lines of said Pioneer Quartz Mine are not parallel to each other but diverge and depart from each other in the direction of the dip of said Pioneer vein and in the manner aforesaid, it was not competent to the officers of the Land Department of the United States to make a grant in connection with the grant of said Pioneer Quartz Mine, Lot No. 48, of any extra-lateral right or any right to or interest in any part of said Pioneer vein lying outside the vertical boundaries of said Lot No. 48, AND THEREFORE the act of the officers of the Land Department of the United States in granting or attempting to grant an extra-lateral right in and by means of said Pioneer patent, was and is against law and was and is absolutely void; and

(*b*) All the ores in dispute in this cause were extracted by defendant from said Pioneer vein at points within the vertical boundaries of defendant's Silva Quartz Mine, Lot No. 86, and distant more than 900 feet from the vertical boundaries of said Pioneer Quartz Mine, Lot No. 48, and DEFENDANT SPECIALLY SETS UP AND CLAIMS that, because of the fact that, as shown by said Pioneer patent, the end lines of said Pioneer Quartz Mine, Lot No. 48, are not parallel to each other, and because of the further fact that said end lines diverge and depart from each other in the direction of the dip of said Pioneer vein, such divergence and departure being to the extent of fourteen (14) degrees and forty-five (45) minutes, so that in order to reach said points where said ores were extracted, it is

necessary to follow said Pioneer vein on its dip away from said Lot No. 48, and in the direction of said divergence to points distant more than nine hundred feet from said Lot No. 48,—THEREFORE and because of the provisions of the Act of the Congress of the United States, approved May 10, 1872, entitled "An Act to promote the development of the Mining Resources of the United States" under which said Pioneer patent was issued, and especially because of the provisions of sections two (2) and three (3) of said Act, the owners of said Pioneer Quartz Mine, Lot No. 48, are not now and never have been the owners of or entitled to the possession of any part of said Pioneer vein which lies outside of the vertical boundaries of said Pioneer Quartz Mine, Lot No. 48 as described in said United States patent therefor, and are not now and never have been the owners of or entitled to the possession of the ores in dispute in this cause or any thereof; and

(*c*) All the ores in dispute herein were extracted by defendant from points without the vertical boundaries of said Pioneer Quartz Mine, Lot No. 48, and by reason of the surface form or shape of said Pioneer Quartz Mine, Lot No. 48, its owners never have had and have not now any right under any law of the United States or under any law to follow said Pioneer vein in its downward course beyond the lines of said Pioneer Quartz Mine, Lot No. 48; and

(*d*) The grant or attempted grant of an extra-lateral right in and by said Pioneer patent is indefinite and uncertain in this, said patent purports to grant only

$1589^{94}/_{100}$ linear feet of said Pioneer vein throughout its entire depth, and by the conditions of said patent the interest in said Pioneer vein thereby granted or attempted to be granted, is specifically restricted to $1589.^{94}/_{100}$ linear feet thereof, but it cannot be ascertained from said Pioneer patent what particular segment of $1589^{94}/_{100}$ linear feet of said Pioneer vein is intended to be granted thereby, nor can it be ascertained from said Pioneer patent whether it is intended thereby to grant that certain segment of $1589^{94}/_{100}$ linear feet of said Pioneer vein lying parallel to and next northerly from the south end line of said Pioneer Quartz Mine extended in its own course easterly, or whether it is intended by said Pioneer patent to grant that certain segment of $1589^{94}/_{100}$ linear feet of said Pioneer vein lying parallel to and next southerly from the north end line of said Pioneer Quartz Mine extended in its own course easterly, or whether it is intended by said Pioneer patent to grant a segment of $1589^{94}/_{100}$ linear feet of said Pioneer vein midway between said end lines of said Pioneer Quartz Mine indefinitely extended in their own directions respectively, so that, even though the grant of $1589^{94}/_{100}$ linear feet of said Pioneer vein mentioned in said Pioneer patent were valid, it cannot be ascertained in any way or manner from said Pioneer patent whether or not the ores in dispute in this cause ever formed part of that particular segment of the Pioneer vein intended to be conveyed by said patent to the Pioneer Gold and Silver Mining Company; and

(c) If said Pioneer patent can be construed as defining and conveying any interest at all in any part of said Pioneer vein lying outside of said Lot No. 48, such interest so defined and conveyed must be either (1) that certain segment of $1589^{91}/_{100}$ linear feet of said vein lying parallel to and next northerly from the south end line of said Lot No. 48 extended in its own course easterly, because, as is shown by said Pioneer patent and by the complaint herein, said south end line of said Lot No. 48 constitutes the base line and initial boundary thereof, from which all its other boundaries must be measured, or (2) that certain triangular segment of said vein having for ITS NORTH BOUNDARY, a line drawn from the center of the north end line of said Lot No. 48, to-wit, from the north end of said vein, parallel to the south end line of said Lot No. 48 extended in its own course North eighty-nine (89) degrees and thirty-six (36) minutes east, and FOR ITS SOUTH BOUNDARY, a line drawn from the center of the south end line of said Lot No. 48, to-wit, from the south end of said vein, parallel to the north end line of said Lot No. 48 extended in its own course North seventy-four (74) degrees and fifty-one (51) minutes east, because said triangular segment of said vein includes the only portion of said vein outside of said Lot No. 48, which is definable by reference to the boundaries of said Lot No. 48, so that in no case can it be shown that the disputed ores ever constituted part of any vein segment conveyed by means of said Pioneer patent.

AND DEFENDANT IN LIKE MANNER OBJECTS TO THE ADMISSION AS EVIDENCE HEREIN OF THE FOLLOWING ADDITIONAL FACTS, to-wit:

*Twenty-third.* All and singular each and every the facts set forth in paragraph XXIII of said agreed statement, showing among other matters and things, that defendant has extended its 1450, 1550, 1650 and 1750 levels south of a vertical plane drawn down through the north end line of said Lot No. 48 extended indefinitely in its own direction North seventy-four (74) degrees and fifty-one (51) minutes East, and that between October 8, 1895, and December 12, 1895, this defendant extracted 2,604 tons of ore from said Pioneer vein southerly from said vertical plane but within the vertical boundaries of said Silva Quartz Mine, and that the gross value of said 2,604 tons of ore was $62,218.45, and that the aggregate cost of mining and milling said 2,604 tons of ore was $6,119.40, and that the net profit realized by defendant from said 2,604 tons of ore was $56,099.95;

*Twenty-fourth.* All and singular each and every the facts set forth in paragraph XXIV of said agreed statement, in so far as such facts show or tend to show that the aforesaid 2,604 tons of ore were extracted from said Pioneer vein south of said vertical plane drawn down through the line named in said paragraph XXIV as the line A—B—B′.

Defendant bases its aforesaid objections to the admission as evidence herein of such facts set forth in said par-

agraphs XXIII and XXIV of said agreed statement, upon the following grounds, to-wit:

(a) All and singular each and every the facts so objected to are immaterial and irrelevant to all and singular each and every the issues in this cause and are incompetent as evidence to prove the issues herein or any of them, because: ALTHOUGH IT IS TRUE that all of said ores were extracted by defendant from the vein mentioned in said Pioneer patent and in the complaint herein and in said agreed statement as the Pioneer vein, and that the apex of said Pioneer vein extends from the center of the south end line of said Lot No. 48 throughout the entire length of said Lot and midway between the side lines thereof to the center of the north end line thereof, and that all of said ores were extracted by defendant from points between vertical planes drawn down through the end lines of said Lot No. 48 indefinitely extended in their own directions respectively,—IT IS ALSO TRUE that, as shown by the facts set forth in paragraphs XXIII of said agreed statement and by reference to "Exhibit A" referred to in said paragraph XXIII and attached to said agreed statement, all of said ores were extracted by defendant from points on the dip of said vein more than 1300 feet vertically below the surface of the earth and outside of and distant more than 900 feet easterly from the vertical boundaries of said Lot No. 48, to-wit, more than 900 feet easterly from a vertical plane drawn down through the easterly side line of said Lot No. 48, AND IT IS ALSO TRUE that, as shown by said Pioneer patent

and by the complaint herein and by reference to said "Exhibit A," the end lines of said Pioneer Quartz Mine, Lot No. 48, are not parallel to each other, but, on the contrary, the northern end line thereof in its course from its west end easterly diverges and departs substantially and at a very large angle toward the north from a line parallel to the southern end line thereof, such divergence and departure being to the extent of fourteen (14) degrees and forty-five (45) minutes, the course of said southern end line from its west end easterly being north eighty-nine (89) degrees and thirty-six (36) minutes east, and the course of said northern end line from its west end easterly being north seventy-four (74) degrees and fifty-one (51) minutes east, AND IT IS ALSO TRUE that, as shown by the facts set forth in paragraphs XX, XXII, XXIII, XXIV and XXV of said agreed statement, said Pioneer Vein dips and extends downward into the earth at such an angle from the plane of the horizon and in such a manner as to pass from and extend out of said Pioneer Quartz Mine easterly through and beyond the vertical east side line thereof into ground lying easterly from said Lot No. 48 and from said east vertical side line thereof and so onward continuously in the direction of the aforesaid divergence between said end lines of said Lot No. 48 to the points above described where defendant extracted said ores from said vein, all of which points are within the vertical boundaries of defendant's Silva Quartz Mine, Lot No. 86, AND IT IS ALSO TRUE that, as shown by reference to said paragraph XXIII and to said "Exhibit A"

all of said ores were extracted outside of and far easterly from said Lot No. 48 and at points where vertical planes drawn down through the end lines of said Lot No. 48 extended in their own directions respectively, are distant from each other more than 1900 feet, AND IT IS ALSO TRUE that, as shown by said Pioneer patent, the same was issued on the twelfth day of August, 1872, under the provisions of that certain act of the Congress of the United States approved May 10, 1872, entitled "An Act to promote the development of the mining resources of the United States," and more than three months after said Act of Congress became a law, AND IT IS ALSO TRUE that, under the provisions of said Act of Congress and particularly under the provisions of sections two (2) and three (3) thereof, it was at the time of the issuance of said Pioneer patent, ever since has been and now is, necessary that the end lines of said Pioneer Quartz Mine, Lot No. 48, should be parallel to each other in order that any extra-lateral right or any right to or interest in any part of said Pioneer vein lying outside the vertical boundaries of said Lot No. 48, should or could attach to said Pioneer Quartz Mine, and be enjoyed by the owners thereof; AND THEREFORE and because the end lines of said Pioneer Quartz Mine are not parallel to each other but diverge and depart from each other in the direction of the dip of the Pioneer vein and in the manner aforesaid, it was not competent to the officers of the Land Department of the United States to make a grant in connection with the grant of said Pioneer Quartz Mine, Lot No. 48, of any

extra-lateral right or any right to or interest in any part of said Pioneer vein, lying outside the vertical boundaries of said Lot No. 48, AND THEREFORE the act of the officers of the Land Department of the United States in granting or attempting to grant an extra-lateral right in and by means of said Pioneer patent, was and is against law and was and is absolutely void; AND THEREFORE said ores did not pass to the Pioneer Gold and Silver Mining Company by means of said Pioneer patent, AND THEREFORE did not pass to plaintiff herein by means of the deed whereby said Pioneer Gold and Silver Mining Company conveyed said Pioneer Quartz Mine to said plaintiff; and

(*b*) All of said 2,604 tons of ore were extracted by defendant from the vein of which said Pioneer vein forms a part at points distant more than 900 feet from said Lot No. 48 and within the vertical boundaries of defendant's Silva Quartz Mine, Lot No. 86, which was granted to this defendant on the sixth day of February, 1893, by letters patent of the United States issued in pursuance of the provisions of Chapter Six of Title Thirty-two of the Revised Statutes of the United States, and legislation supplemental thereto, and DEFENDANT SPECIALLY SETS UP AND CLAIMS that under the aforesaid statutes and legislation of the United States, this defendant at all the times mentioned in said complaint has had and now has against all the world the exclusive title and right to all and singular each and every the aforesaid 2,604 tons of ore and to all and singular each and every the sub-

stance contained within the vertical boundaries of said Lot No. 86, and DEFENDANT further under said statutes and legislation of the United States, SPECIALLY SETS UP AND CLAIMS immunity from any and all claims of said plaintiff to said 2,604 tons of ore or any thereof and from any and all claims of said plaintiff to the substance contained within the vertical boundaries of said Lot No. 86 or any thereof and DEFENDANT FURTHER SPECIALLY SETS UP AND CLAIMS immunity from and against the claims of plaintiff to said 2,604 tons of ore and to the substance contained within the vertical boundaries of said Lot No. 86, because of the fact that, as shown by said Pioneer patent, the end lines of said Pioneer Quartz Mine, Lot No. 48, are not parallel to each other, and because of the further fact that said end lines diverge and depart from each other in the direction of the dip of said Pioneer vein, such divergence and departure being to the extent of fourteen (14) degrees and forty-five (45) minutes, so that in order to reach said points where said ores were extracted, it is necessary to follow said Pioneer vein on its dip away from said Lot No. 48 and in the direction of said divergence to points distant more than nine hundred feet from said Lot No. 48. THEREFORE and because of the provisions of the Act of the Congress of the United States, approved May 10, 1872, entitled "An Act to promote the development of the Mining Resources of the United States," under which the U. S. patent to said Lot No. 48 was issued, and especially because of the provisions of sections two (2) and three (3) of

said Act, the owners of said Pioneer Quartz Mine, Lot No. 48, are not now and never have been the owners of or entitled to the possession of said 2,604 tons of ore or any thereof, and are not now and never have been the owners of or entitled to the possession of the substance contained within the vertical boundaries of said Lot No. 86, or any thereof; and

(c) All the ores in dispute herein were extracted by defendant from points without the vertical boundaries of said Pioneer Quartz Mine, Lot No. 48, and by reason of the surface form or shape of said Pioneer Quartz Mine, Lot No. 48, its owners never have had and have not now any right under any law of the United States or under any law to follow said Pioneer vein in its downward course beyond the lines of said Pioneer Quartz Mine, Lot No. 48; and

(d) The averment in the complaint herein of an extra-lateral right is indefinite and uncertain in this, said complaint alleges the ownership of plaintiff in and to $1589^{94}/_{100}$ linear feet of said Pioneer Vein with the exclusive right to said $1589^{94}/_{100}$ linear feet of said vein throughout its entire depth although it may enter the land adjoining, but it is not alleged in said complaint that plaintiff has or ever had any interest in said Pioneer vein excepting said $1589^{94}/_{100}$ linear feet thereof throughout their entire depth as aforesaid, and it cannot be ascertained from said complaint what particular $1589^{94}/_{100}$ linear feet of said Pioneer Vein is intended to be claimed by plaintiff, nor can it be ascertained from said complaint

whether it is the intention of plaintiff to claim that certain segment of $1589^{94}/_{100}$ linear feet of said Pioneer Vein lying parallel with and next northerly from the south end line of said Lot No. 48 extended in its own course easterly, or whether it is intended by said complaint to claim that certain segment of $1589^{94}/_{100}$ linear feet of said Pioneer vein lying parallel to and next southerly from the north end line of said Lot No. 48 extended in its own course easterly, or whether it is intended by said complaint to claim a segment of $1589^{94}/_{100}$ linear feet of said Pioneer vein midway between said end lines of said Pioneer Quartz Mine indefinitely extended in their own directions respectively, so that it cannot be ascertained in any way or manner from said complaint whether or not the ores in dispute in this cause ever formed part of that particular segment of the Pioneer vein claimed by plaintiff in its said complaint; and

(c) If said complaint can be construed as defining any claim at all of plaintiff to any part of said Pioneer vein lying outside of said Lot No. 48, such part so defined must be either (1) that certain segment of $1589^{94}/_{100}$ linear feet of said vein lying parallel to and next northerly from the south end line of said Lot No. 48 extended in its own course easterly, because, as is shown by said complaint, said south end line of said Lot No. 48 constitutes the base line and initial boundary thereof, from which all its other boundaries must be measured, or (2) that certain triangular segment of said vein having for ITS NORTH BOUNDARY, a line drawn from the center of the north end line

of said Lot No. 48, to-wit, from the north end of said vein, parallel to the south end line of said Lot No. 48 extended in its own course North eighty-nine (89) degrees and thirty-six (36) minutes east, and FOR ITS SOUTH BOUNDARY, a line drawn from the center of the south end line of said Lot No. 48, to-wit, from the south end of said vein, parallel to the north end line of said Lot No. 48 extended in its own course North seventy-four (74) degrees and fifty-one (51) minutes east, because said triangular segment of said vein includes the only portion of said vein outside of said Lot No. 48 which is definable by reference to the boundaries of said Lot No. 48 as set out in said complaint, so that in no case can it be shown that the disputed ores ever constituted part of any vein segment described in said complaint.

And THIS DEFENDANT SPECIALLY SETS UP AND CLAIMS that, in the decision of all and singular each and every the questions raised by those of the foregoing objections which relate to the right and title asserted by plaintiff to the ores in question by reason of its ownership of the Pioneer Quartz Mine, Lot No. 48, as well as in the decision of all and singular each and every the questions raised by those of the foregoing objections which relate to the right and title asserted by defendant to said ores by reason of its ownership of the Silva Quartz Mine, Lot No. 86, is involved: First, the construction of the Act of the Congress of the United States approved May 10, 1872, entitled "An Act to promote the development of the Mining Resources of the United States," un-

der the provisions of which plaintiff acquired its title to said Lot No. 48; and, second, the construction of Chapter Six of Title Thirty-two of the Revised Statutes of the United States and legislation supplemental thereto, under the provisions of which defendant acquired its title to said Lot No. 86.

And all and singular each and every of such objections are so SPECIALLY SET UP AND CLAIMED BY DEFENDANT so as to apprise the court that the Federal Questions so involved are presented for its consideration and decision. John M. Wright, Byron Waters, John J. Snyder, Attorneys for Defendant.

[Endorsed]: No. 1408. In the Superior Court of the County of Calaveras, State of California. Argonaut Mining Company (a corporation) Plaintiff vs. Kennedy Mining and Milling Company (a corporation) Defendant. Defendant's objections to certain facts in the agreed statement. Service of the within by delivery of a copy thereof admitted this 11th day of October, 1898.

Lindley & Eickhoff, W. J. McGee, F. J. Solinsky, Attorneys for Plaintiff.

Filed this 12th day of October, 1898. A. L. Wyllie, Clerk. By W. S. Coulter, Deputy Clerk.